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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1981

WILLIAM FISHER,

Petitioner,

vs.

CITY OF TUCSON, an incorporated municipality,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Questions Presented.

1. Whether the court below erred in holding that petitioner, a qualified handicapped individual, could not maintain a private cause of action against respondent, a federal contractor, for conceded violations of the provisions of Section 503 of the Rehabilitation Act of 1973, 29 U.S.C., Section 793. ("Section 503")

2. Whether the court below, having unanimously held that Congress, in enacting Section 503, intended to create a federal right in favor of petitioner, erred in ultimately deciding by a divided vote that a private right of action under the congressional enactment was not available to petitioner.

3. Whether, in the light of the statutory language and legislative history evidencing congressional intent to grant the broadest rights and remedies to qualified handicapped persons suffering discrimination in employment, the court below erred in holding that the civil rights granted by Section 503, created no private right of action for petitioner.

4. Whether the court below erred in holding that Section 503 created no right of private action in favor of petitioner where Congress specifically intended to create a federal right in favor of petitioner; where the legislative history of the statute clearly indicated a congressional intent to create a private action; where implication of a private remedy would be consistent with the declared purposes of the congressional enactment; and where the petitioner's causes of action were not traditionally relegated to state law.

5. Whether the congressional mandate embodied in Section 503 requiring the federal agency and federal con-

tractor to embody by agreement provisions for the specific protection of qualified handicapped persons, including petitioner, to gainful employment free from discriminatory practices, vested in petitioner a property entitlement requiring, as a matter of due process, the right of petitioner to invoke judicial relief.[1]

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[1]The caption of the case in this Court contains the name of all parties.

TABLE OF CONTENTS

Page

Questions Presented i

Opinions Below 1

Jurisdiction 1

Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 5

I.

The Unanimous Finding of the Court Below That the Congressional Enactment Created a Federal Right on Behalf of Petitioner Supports the Implication of a Private Right of Action on Behalf of Petitioner 5

II.

Section 503 Is a Broad Remedial Civil Rights Measure Intended to Protect Qualified Handicapped Persons From Discriminatory Employment Practices. Under Such Circumstances, the Courts Have Uniformly Implied a Private Cause of Action on Behalf of the Members of the Protected Class 7

III.

The Standards and Criteria Enunciated by Supreme Court Decisions for the Implication of Private Remedies Are All Met in This Proceeding. Section 503 Creates a Federal Right in Favor of Petitioner; Congress Intended to Create Such a Remedy; an Implied Remedy Is Consistent With the Legislative Scheme; and the Causes of Action Are Not Traditionally Relegated to State Law 11

A. The State of the Law at the Time Section 503 Was Enacted in 1973 Supports Petitioner's

Page

Contention That Congress Intended Handicapped Persons to Have a Private Cause of Action Under Section 503 11

B. A Private Cause of Action Under Section 503 Is Also Mandated Under the Court's Decisions Subsequent to the Enactment of Section 503 14

IV.

Section 503 Creates a Property Entitlement in Petitioner and Vindication of Petitioner's Entitlement by a Private Action Would Satisfy Due Process and Effectuate Congressional Purposes 26

Conclusion 29

INDEX TO APPENDICES

Appendix A. Opinion of the Court of Appeals ..... App. p. 1

Fletcher, Circuit Judge, Concurring and Dissenting 15

Appendix B. Order of the United States District Court for the District of Arizona 23

Appendix C. Order Denying Petition for Rehearing 29

Appendix D. Pertinent Statutes Involved 30

TABLE OF AUTHORITIES

Cases	Page
Allen v. State Board of Elections, 393 U.S. 544 (1969)	8, 9, 14, 15
Bossier Parish School Board v. Lemmon, 370 F.2d 847 (5 Cir. 1967), cert. den. 388 U.S. 911 (1967)	9
California v. Sierra Club, 451 U.S. 287 (1981)	6, 25
Cannon v. University of Chicago, 441 U.S. 677 (1979)	4, 6, 9, 22, 23, 25
Chaplin v. Consolidated Edison Co. of New York, Inc., 482 F.Supp. 1165 (S.D. N.Y. 1980)	13
Cort v. Ash, 422 U.S. 66 (1975)	4, 6, 15, 16, 21, 22, 23, 25
Davis v. United Air Lines, Inc., 662 F.2d 120 (2 Cir. 1981)	7
Euresti v. Stenner, 458 F.2d 1115 (10 Cir. 1972)	9
FHA v. The Darlington, Inc., 358 U.S. 84 (1958)	21
Fullilove v. Klutznick, 448 U.S. 448 (1980)	21
Gomez v. Florida State Employment Service, 417 F.2d 569 (5 Cir. 1969)	9, 28
J. I. Case Co. v. Borak, 377 U.S. 426 (1964)	11, 12, 14, 15, 22
Lau v. Nichols, 414 U.S. 563 (1974)	9, 28
Logan v. Zimerman Brush Co., ___ U.S. ___, 102 S.Ct. 1148 (1982)	28, 29
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	5
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 102 S.Ct. 1825 (May 3, 1982)	25, 26
Montgomery Improvement Ass'n., Inc. v. United States Department of H.U.D., 645 F.2d 291 (5 Cir. 1981)	10
NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974)	21

Page

National Railroad Passenger Corp. v. National Association of Railroad Passengers, 414 U.S. 453 14

North Haven Board of Education v. Bell ___ U.S. ___ (No. 80-986, May 17, 1982) 20, 21

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977) 22

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 21

Regents of the University of California v. Bakke, 438 U.S. 265 (1978) 9

Rogers v. Frito-Lay, Inc., 611 F.2d 1074, cert. den. 449 U.S. 889 (1980) 3, 4, 7, 12, 19

Rosado v. Wyman, 397 U.S. 397 (1970) 9, 14, 28

Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975) 14, 15

Southern Illinois Builders Ass'n. v. Ogilvie, 471 F.2d 680 (7 Cir. 1972) 10

Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 ..... 8, 14

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 6, 13, 14

Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33 (1916) 11

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 6, 23, 24

Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) 24

Tunstall v. Brotherhood, 323 U.S. 210 (1944) 5, 6, 8, 13

Page

Universities Research Ass'n., Inc. v. Coutu, 450 U.S. 754 (1981) 24, 25

Wyandotte Transportation Co. v. United States, 389 U.S. 191 (1967) 12

Miscellaneous

119 Congressional Record, p. 635 (1973) 16

120 Congressional Record, p. 3055 (1974) 18

House Report No. 95-1149, 6 U.S. Code Cong. & Adm. News 7313, 7332, 7352 (1978) 18

Senate Report No. 93-318 and House Conference Report No. 93-500, 2 U.S. Code Cong. & Adm. News 2076-2154 (1973) 16

Senate Report No. 93-1279, 4 U.S. Code Cong. & Adm. News 6389-6391, 6413 ..... 17, 18

Senate Report No. 95-890, 95th Cong., 2d Sess. 19 (1978) 18, 19

U.S. Commission on Civil Rights, The Federal Civil Rights Enforcement Budget: Fiscal year 1983, pp. 40-41 (June, 1982) 13

Statutes

Code of Federal Regulations, Title 41, Sec. 60-741.4 ..... 10, 27

Code of Federal Regulations, Title 41, Secs. 60-741.20 to 741.32 13

Investment Advisers Act of 1940, Sec. 215 24

Public Law 93-516, Title I, Sec. 111(a), Dec. 7, 1974, 88 Stat. 1619 17

Public Law 93-516, Title III, Dec. 7, 1974, 88 Stat. 1631-1634 17

Page

Rehabilitation Act of 1973, Sec. 503 (29 U.S.C., § 793) ..... i, 2, 3, 4, 5, 6, 7, ... 10, 11, 12, 13, 14, 15, 17, 21, 23, 26, 29

Rehabilitation Act of 1973, Sec. 505 18

Rehabilitation Act of 1973, Sec. 794a(b) 18

United States Code, Title 28, Sec. 1254(1) 2

United States Code, Title 29, Sec. 701(1) 2

United States Code, Title 29, Sec. 701(8) 2, 16

United States Code, Title 29, Sec. 706(6) 3, 17

United States Code, Title 29, Sec. 793(a)(b) 27

United States Code, Title 29, Sec. 794a 2

Voting Rights Act of 1965, Sec. 5 8

Textbooks

Bayh, Senator Birch, Foreword, Symposium Issue on Employment Rights of the Handicapped, 27 De Paul L. Rev. 943 (1978) 19, 20

Comment, 129 U. Pa. L. Rev. 442-446 21

Note, Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973, 79 Mich. L. Rev. 1093, 1111-1112 (1981) 20

Note, Private Rights of Action for Handicapped Persons under Section 503 of the Rehabilitation Act, 13 Valparaiso L. Rev. 453, 465, 467 (1979) 13

Stewart and Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1195, 1311 (1982) 28

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IN THE

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WILLIAM FISHER,

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner William Fisher respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed and entered November 23, 1981.

Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 663 F.2d 861 and is set forth in Appendix A. The order and opinion of the District Court is unreported and is set forth in Appendix B.

Jurisdiction.

The opinion and judgment of the Court of Appeals was entered on November 23, 1981. A duly filed petition for rehearing and suggestion for rehearing en banc was denied

on March 31, 1982. A copy of the order denying the petition is set forth in Appendix C. The jurisdiction of this Court is unvoked under 28 U.S.C. Section 1254(1).

Statutes Involved.

The statutes involved, 29 U.S.C., §§ 701(1) and (8), 793, and 794a, are set forth as Appendix D.

Statement of the Case.

A. Petitioner's amended complaint alleged that petitioner was an honorably discharged veteran who served in the United States Air Force in the years 1964 to 1968. He achieved experience as an aircraft mechanic and maintenance technician. His educational background brought him an Associate of Applied Sciences in Electronics Technology; his practical experience additionally was acquired in the field of electronics.

In October 1976, petitioner took a civil service examination for a permanent position as "industrial electronics technician I". Petitioner received the highest score on the examination. Together with two other persons, petitioner was invited to a final interview with the city's transportation department traffic engineer division. At the interview, petitioner stated that he hd suffered a lower back injury for which treatment was required, but that he had largely recovered from the injury. Petitioner asserted that he could perform the work required, but he was nevertheless denied employment solely because of alleged physical disability. Petitioner alleged in the complaint that he "was and is capable of performing the duties required of an industrial electronics technician I", and that petitioner's technical and practical qualifications exceeded those of the individuals finally hired.

It was further alleged that a complaint was thereafter filed with the United States Department of Labor. The Department found petitioner to be a handicapped person within the meaning of 29 U.S.C. Section 706(6) and the respondent a federal contractor within the meaning of Section 503. The department nevertheless informed petitioner that the Department had determined that petitioner was not physically able to perform the duties of the job, and that the Department intended no further action on the matter.

The complaint alleged that respondent, in violation of Section 503, had denied petitioner employment solely because petitioner suffers from a physical disability not directly related to performance of the work required therein. Petitioner stated that by virtue of 29 U.S.C. Section 706(6), he was entitled to be free from that discriminatory conduct which Section 503 prohibits.

The respondent moved to dismiss the complaint on the ground that the District Court lacked jurisdiction because the claims allegedly did not arise under the Constitution, laws, or treaties of the United States.

B. The District Court granted the motion to dismiss upon the ground that petitioner failed to state a claim for which relief could be granted. The District Court held (Appendix B) that petitioner did not have an independent cause of action under Section 503. The court decided that Congress intended the administrative remedies to be exclusive; that an independent right of action would be inconsistent with the existing enforcement scheme.

C. In a divided opinion, the Court of Appeals affirmed (Appendix A). The majority assumed, for purposes of the appeal, the truth of the facts alleged in the amended complaint. The same majority found and decided, contrary to the majority opinion of the Fifth Circuit in *Rogers v. Frito-*

Lay, Inc., 611 F.2d 1074, *cert. den.* 449 U.S. 889 (1980), that the statute creates "a federal right" on behalf of the protected class. It was apparent, stated the majority, that Congress did intend to confer some federal rights on handicapped individuals. Nevertheless, the majority concluded that it would not imply a private cause of action since the statute on its face does not prohibit discrimination; since the legislative history failed to furnish a clear indication of congressional intent; and because a private cause of action might conflict with the administrative enforcement scheme.

Judge Fletcher dissented from the majority's holding. She held that a critical examination of legislative history indicated clearly that "Congress understood section 503 to include a private enforcement right". Moreover, since the court was unanimous in holding that Congress had enacted Section 503 for the especial benefit of handicapped persons and created a federal right on their behalf, Judge Fletcher was of the opinion that it was not necessary to show an express intention on the part of Congress to create a private cause of action, no explicit purpose to deny such cause of action having been shown. Reliance was placed on this Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979), and *Cort v. Ash*, 422 U.S. 66, 82 (1975). The dissenting Judge also could find no ground for concluding that a private right of action would be inconsistent with the legislative scheme established by Section 503, especially since the Department of Labor had found no inconsistency between private and administrative enforcement and, indeed, had repeatedly expressed its opinion "that a private right of action would complement the administrative mechanism".

REASONS FOR GRANTING THE WRIT.

I.

THE UNANIMOUS FINDING OF THE COURT BELOW THAT THE CONGRESSIONAL ENACTMENT CREATED A FEDERAL RIGHT ON BEHALF OF PETITIONER SUPPORTS THE IMPLICATION OF A PRIVATE RIGHT OF ACTION ON BEHALF OF PETITIONER.

The court below found that there existed in favor of petitioner a clearly articulated federal right. This Court has continually held that where federal law clearly provides an individual with rights under federal law, proof of an explicit congressional intent to create a private remedy is not necessary. While subsequent discussion will establish that Congress did in fact intend to provide judicial relief to qualified handicapped persons for alleged violations of Section 503, this initial discussion is concerned with a person's access to the courts where rights concededly vested in such person by the Congress have been violated. The uniform holding has been that the right to judicial remedies for violations of vested rights is fundamental under the Constitution and laws of the country.

As early as 1803, the Court stated:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury . . . . The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162-163.

This basic principle has been reiterated under various circumstances up to the present time. Thus, in *Tunstall v. Brotherhood*, 323 U.S. 210, 213 (1944):

> "We also hold that the right asserted by petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right implied from the statute and the policy which it has adopted."

Five years later, the Court stated:

> "The existence of a statutory right implies the existence of all necessary and appropriate remedies . . . . [I]s a federal rule responsive to the need whenever a federal right is impaired." *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239-240 (1969).

In *Cort v. Ash*, 422 U.S. 66, 78, 82 (1975), the Court's initial inquiry was:

> "Does the statute create a federal right in favor of the plaintiff?",

and affirmed that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." (Court's emphasis). This statement was reiterated in *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979).

In *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979), the Court observed:

> "It is true that in the past our cases have held that in certain circumstances a private right of action may be implied in a statute not expressly providing one. But in those cases finding such implied private remedies, the statute in question at least prohibited certain conduct or created federal rights in favor of private parties."

In *California v. Sierra Club*, 451 U.S. 287, 294 (1981) the Court stated that the question is "whether Congress intended to confer federal rights upon these beneficiaries."

The court below was unanimous in finding that Section 503 creates a federal right on behalf of qualified handicapped persons, 663 F.2d at 863, 867-868. Other courts following *Frito* have denied that the statute was enacted for the especial benefit of handicapped persons. Yet vigorous dissents have been registered to these opinions. See, Judge Goldberg dissenting in *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1085-1109 (5 Cir. 1980); Judge Kaufman dissenting in *Davis v. United Air Lines, Inc.*, 662 F.2d 120, 127-130 (2 Cir. 1981); and Judge Fletcher dissenting in the case herein, 663 F.2d at 867-871. In addition, the district courts which have considered the question of an implied right of action under Section 503 are fairly evenly divided. *See, Davis v. United Air Lines, Inc., supra*, 662 F.2d at 121, fn.2.

The court below has decided an important question of law which has not been, but should be, settled by this Court. The question is an important one and of a recurring nature, made apparent by the conflicting views expressed by lower federal courts and judges. The conflict, it is submitted, should be resolved by this Court so that a rule will be enunciated which can be applied uniformly in Section 503 cases.

II.

SECTION 503 IS A BROAD REMEDIAL CIVIL RIGHTS MEASURE INTENDED TO PROTECT QUALIFIED HANDICAPPED PERSONS FROM DISCRIMINATORY EMPLOYMENT PRACTICES. UNDER SUCH CIRCUMSTANCES, THE COURTS HAVE UNIFORMLY IMPLIED A PRIVATE CAUSE OF ACTION ON BEHALF OF THE MEMBERS OF THE PROTECTED CLASS.

There is an additional consideration involved here. Section 503 is not merely an economic measure. The Rehabilitation Act recognizes that handicapped persons have a

federally protected right to be free from discrimination. Congress and the executive have recognized and affirmed this right again and again. The regulatory agencies have specifically recognized the right, including the federal agency here involved. Indeed, it is fair to argue that the enactment by Congress of the provisions of the Rehabilitation Act were intended to secure individual due process and equal protection rights under the Constitution. In any event, this Court has always given the broadest sweep possible to congressional statutes aimed at eliminating invidious discrimination.

As early as 1944, in *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, and *Tunstall v. Brotherhood*, 323 U.S. 210, the Court held that black employees had an implied right of action to sue under the statute against the union and employer to be relieved from discriminatory agreements entered into by the union and management. The Court held that the Railway Labor Act imposed a duty upon the union as exacting "as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates . . . Congress plainly did not authorize the bargaining representative to make such discriminations." 323 U.S. at 202-203.

In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), individual voters were deemed to have an implied right to challenge state voting measures under section 5 of the Voting Rights Act of 1965, despite the fact that the act granted enforcement authority to the Attorney General of the United States. This Court stated:

> "The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely upon litigation instituted at the discretion of the Attorney General . . . The guarantee of section 5 . . . might well prove an empty promise

> unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 556-557.

In *Rosado v. Wyman*, 397 U.S. 397 (1970), the Court made it clear that the congressional enactment had provided the welfare recipients with personal federal rights, and stated:

> "We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. at 420.

Other decisions of this Court in equal rights cases brought under federal statutes, such as *Lau v. Nichols*, 414 U.S. 563 (1974); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); and *Cannon v. University of Chicago*, 441 U.S. 677 (1979), all recognized explicitly or implicitly that private rights of action were implicated in these civil rights laws.

Lower courts have also recognized private litigation in federal courts as an important tool for the advancement of civil rights. *Bossier Parish School Board v. Lemon*, 370 F.2d 847 (5 Cir. 1967), *cert. den.* 388 U.S. 911 (1967) (standing to assert under federal statute right to equal educational opportunities); *Gomez v. Florida State Employment Service*, 417 F.2d 569 (5 Cir. 1969) (migratory farm workers under Wagner-Peyser Act have implied rights and remedies against employers and state officials); *Euresti v. Stenner*, 458 F.2d 1115 (10 Cir. 1972) (indigents have implied civil remedy to enforce the provisions of Hill-Burton

Act); *Montgomery Improvement Ass'n., Inc. v. United States Department of H.U.D.*, 645 F.2d 291 (5 Cir. 1981) (low and moderate income residents have implied rights of action under Civil Rights and Federal Housing Acts).

There are a number of common threads running through these civil rights cases involving discriminatory conduct of various character. The fact that Congress provided for administrative enforcement did not bar the finding of an implied right of action. Courts have not found that implication of a private action would be inconsistent with the purpose of the civil rights statutes. Those statutes are intended to protect the rights of all individuals from discrimination and the protection of each individual is therefore consistent with the broader interest which the statutes seek to protect. The courts have generally considered the basic congressional policies in enacting the legislation as a factor in determining whether an action should be implied. Consideration has been given to the fundamental purpose of civil rights legislation and the extent to which implication of federal rights would aid in furthering such legislation.

It is, therefore, not only the fact that the court below found that Section 503 created a federal right on behalf of the petitioner, but also that the statute is in the field of civil rights, which leads to the conclusion, that private rights of action exist under Section 503. That the statute is a civil rights law and forbids discrimination can hardly be doubted. Indeed, "the obligation to take affirmative action imports more than the negative obligation not to discriminate". *Southern Illinois Builders Ass'n. v. Ogilvie*, 471 F.2d 680, 684 (7 Cir. 1972). The contractual obligation of the respondent in this case required it not to discriminate against petitioner, as the court below recognized, in accordance with the agency's interpretation of § 503. 41 C.F.R. § 60-741.4.

III.

THE STANDARDS AND CRITERIA ENUNCIATED BY SUPREME COURT DECISIONS FOR THE IMPLICATION OF PRIVATE REMEDIES ARE ALL MET IN THIS PROCEEDING. SECTION 503 CREATES A FEDERAL RIGHT IN FAVOR OF PETITIONER; CONGRESS INTENDED TO CREATE SUCH A REMEDY; AN IMPLIED REMEDY IS CONSISTENT WITH THE LEGISLATIVE SCHEME; AND THE CAUSES OF ACTION ARE NOT TRADITIONALLY RELEGATED TO STATE LAW.

In this section of the petition, the purpose is to show that the right of petitioner to judicial remedies under Section 503 is consistent with the decisions of this Court in the cases where a private action has been implied and readily distinguishable from the decisions where an implied cause has been denied.

A. The State of the Law at the Time Section 503 Was Enacted in 1973 Supports Petitioner's Contention That Congress Intended Handicapped Persons to Have a Private Cause of Action Under Section 503.

In *Texas & Pacific Ry. Co. v. Rigsby*, 241 U.S. 33, 39 (1916), the Court stated:

> "A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. . . ."

Here, the statute has been enacted for the especial benefit of qualified handicapped persons seeking employment; the petitioner on this record has been concededly denied employment and not granted any priority despite his qualifications, and solely because of his handicap.

In *J. I. Case Co. v. Borak*, 377 U.S. 426, 432-433 (1964), the statement of the Court included the following:

> "While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors', which certainly implies the availability of judicial relief where necessary to achieve that result. . . . We, therefore, believe that under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."

Section 503 has as its chief purpose the protection of qualified handicapped persons seeking employment. If the congressional purpose is to be made effective, it is clearly necessary to make judicial relief available.

In *Wyandotte Transportation Co. v. United States*, 389 U.S. 191, 200, 204 (1967), the Court observed:

> "But our reading of the Act does not lead us to the conclusion that Congress must have intended the statutory remedies and procedures [removal and sale of craft, criminal penalties] to be exclusive of all others. . . . We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act."

There is not the slightest indication in the language of Section 503 or its legislative history that Congress intended the administrative mechanism provided in the law as the exclusive remedy for enforcement of the Act.

If contemporaneous administrative construction is significant, it is not unimportant that the agency has informed a court that

> "the complainants should have a private right of action under Section 503, and that they should be permitted to pursue such actions without first exhausting the Department of Labor's administrative process." *Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1108.

In 1980, the Department of Labor again, in *Chaplin v. Consolidated Edison Co. of New York, Inc.*, 482 F.Supp. 1165, 1174 (S.D. N.Y. 1980), "submitted data indicating the increasing backlog faced by the office of over two thousand pending section 503 claims". The regulations permit the handicapped person to file a complaint; thereafter, the matter is solely between the agency and the contractor, and any action taken is at the discretion of the agency. C.F.R. 60-741.20 to 741.32.

A critical examination has concluded that the Department of Labor's Office of Federal Contract Compliance Programs

> "has a dismal record of success in effectuating the rights guaranteed by Section 503 . . . the prospective benefits to individual handicapped persons under Section 503 are in serious danger of being diluted unless the beneficiaries of the Act are given powers to ensure enforcement."

Note, *Private Rights of Action for Handicapped Persons under Section* 503 of the Rehabilitation Act, 13 Valparaiso L.Rev. 453, 465, 467 (1979). Under the circumstances, it can hardly be doubted that a private action is necessary to ensure the full effectiveness of Section 503, and plainly such private action will not be inconsistent with the law or the regulations, as the agency has itself urged.*

The standards and criteria enunciated in other cases, *supra*, such as *Tunstall v. Brotherhood, Sullivan v. Little*

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*The budget of the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor has been reduced significantly in fiscal year 1982 and would be reduced further by the proposed 1983 budget. The 1983 budget request has been written for a simplified, scaled down enforcement program which "calls for initiating fewer compliance reviews, severely restricting those it does initiate, and eliminating preaward reviews altogether. With such policy changes, OFCCP . . . will have a less effective program for carrying out its enforcement responsibilities." U.S. Commission on Civil Rights. *The Federal Civil Rights' Enforcement Budget:* Fiscal year 1983, pp. 40-41 (June, 1982).

Hunting Park, Steele v. Louisville & Nashville R.R. Co., Allen v. State Board of Elections, and *Rosado v. Wyman* are all, it is submitted, similarly consistent with the implication of a private action under Section 503. The lower courts uniformly throughout the years followed the standards enunciated by this Court.

This was the state of the law, the legal climate, at the time of the enactment of the Rehabilitation Act in 1973.

B. A Private Cause of Action Under Section 503 Is Also Mandated Under the Court's Decisions Subsequent to the Enactment of Section 503.

In 1974, this Court decided *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453. The suit was brought to enjoin the discontinuance of certain passenger trains. The action was instituted by an association of passengers, although the statute authorized only the Attorney General to bring suits in court. The legislative history indicated an intention to preclude private causes of action. Private lawsuits in multiple areas to prevent discontinuance of uneconomic railroads were deemed by this Court obstructive of congressional purpose. This Court held that the inference of a private cause of action must be consistent with legislative intent and with "the effectuation of the purposes intended to be served by the Act". 414 U.S. at 458, citing *Borak*. Here, in petitioner's case, Congress intended to grant federal rights to the handicapped and, as petitioner has shown, such enforcement is necessary to effectuate the salutary purposes which led to the enactment of Section 503. The *Amtrak* decision is therefore in no way incompatible with the implication of a private action under Section 503.

In *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412 (1975), the Court held that failing broker-dealers

had no implied right of action under the law to compel a public corporation organized under the law to act for their benefit, the Securities and Exchange Commission having the statutory authority to compel the corporation to act. Private actions might precipitate liquidations which the corporation might avoid. This Court, however, was careful to distinguish *Borak* and *Allen*, 421 U.S. at 423-425. In *Borak*, the "broad remedial purposes" of the Act and the agency's representation that private enforcement was necessary to effectuate those purposes justified the implication of a private action for damages, stated the Court. In *Allen*, it was consistent with the broad purpose of the Act to allow the private action, especially where the statutory enforcement authority of the Attorney General was hobbled in practice. It is these latter considerations which are applicable in these proceedings.

Cort v. Ash, 422 U.S. 66 (1975) was a suit by a stockholder against directors of a corporation alleging violations of a statute prohibiting corporate contributions in certain federal elections. The Court could find no clearly articulated federal right in the statute; no legislative history to support implication; no possibility of furthering the statutory purpose; and the suit was in an area primarily of state concern.

The first factor which the Court considered relevant in determining whether a private remedy "is implicit in a statute" was whether the plaintiff was one of the class for whose *especial* benefit the statute was enacted — "that is, does the statute create a federal right in favor of the plaintiff?" (422 U.S. at 78). The court below in this proceeding was unanimous in answering this question in the affirmative so far as the petitioner here is concerned.

The second factor involved any indication of legislative intent, explicit or implicit, either to create a private remedy or to deny one. As far as Section 503 is concerned, no

supportable argument has been advanced to substantiate any claim that Congress, explicitly or implicitly, intended to deny a private action seeking enforcement of the statute. Moreover, this Court stated in *Cort* that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action" (422 U.S. at 82) (Court's emphasis).

In fact, the legislative history, as well as the textual language of the Rehabilitation Act, indicate, explicitly and implicitly, congressional intent to vest a private cause of action in qualified handicapped persons seeking employment with federal contractors. From the inception of the statute, Congress, through its committees and its members, primarily emphasized that the purpose of the Rehabilitation Act is to secure employment for qualified handicapped persons.

The reports of the Senate Committee on Labor and Public Welfare and the House Conference which followed, clearly reveal a desire on the part of the entire Congress to maximize employment opportunities for handicapped and the removal of all barriers, in law or in fact, against the achievement of such objective. S.Rep. No. 93-318 and H.Conf.Rep. No. 93-500, in 2 U.S. Code Cong. and Adm. News 2076-2154 (1973). Indeed, the congressional declaration of purpose in 1973 called for programs to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment". 29 U.S.C. § 701(8). Senator Humphrey, at the time of the passage of the law, welcomed the "program under which the federal contractors shall undertake to employ and advance in employment qualified handicapped individuals. . . . The time has come to firmly establish the right of these Americans." (119 Cong.Rec. 635 (1973)).

In calling for the White House Conference on Handicapped Individuals in 1974, Congress found that it was "of critical importance" to the nation that "equal rights guaranteed by the Constitution of the United States be provided to all individuals with handicaps" and that special consideration was required "assuring individuals with handicaps of equal opportunity with others to engage in gainful employment" (Title III of Pub.L. 93-516, Dec. 7, 1974, 88 Stat. 1631-1634). Under these circumstances, it is appropriate to infer that Congress at least implicitly expected, in view of the then state of the law, that judicial remedies would be available to handicapped persons wrongfully denied employment because of their handicap.

When Congress in 1974 enlarged the definition of "handicapped individual" 29 U.S.C. § 706(6), Pub.L. 93-516, Title I, Section 111(a), Dec. 7, 1974, 88 Stat. 1619, the law was

> "intended to make clearer that the coverage of Sections 503 and 504 extend to persons who have recovered — in whole or in part — from a handicapping condition . . . but who may be discriminated against or otherwise be in need of the protection of sections 503 and 504" (S.Rep. No. 93-1297 in 4 U.S. Code Cong. and Adm. News 6389 (1974)).

The Senate Committee emphasized that the definition "includes within the protection of sections 503 and 504 those persons who do not in fact have the condition which they are perceived as having" (Id., 6389-6390). "The new definition applies to section 503, as well as to section 504" (Id., 6390). Stated the Committee: "It is intended that sections 503 and 504 be administered in such a manner that a consistent, uniform, and effective Federal approach to discrimination against handicapped persons would result" (Id., 6391). The new definition would provide greater lat-

itude "for the nondiscrimination programs carried out under sections 501, 503, and 504" (Id., 6413). Senator Stafford, who served on both the 1973 and 1974 Committees stated to a largely supportive Senate that

> "it was the committee's intent that the enforcement under sections 503 and 504 would be similar to that carried out under section 601 of the Civil Rights Act and 901 of the Education Amendments of 1972" (120 Cong.Rec. 3055 (1974)).

The addition of Section 505 to the Rehabilitation Act in 1978 made the congressional intent with respect to the Act of 1973 patently clear. Section 794a(b) specifically provides that

> "in any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Congressional committee stated that the law "permits courts to award attorney's fees to successful parties in judicial actions to enforce the provisions of Title V" (H.Rep. No. 95-1149 in 6 U.S. Code Cong. and Adm. News 7313 (1978).

> "The new section permits courts, at their discretion, to award to the prevailing party, other than the United States, in any action or proceeding to enforce sections 501, 503 or 504 of the act, a reasonable allowance" (Id., 7332, 7352).

The Senate Report emphasized that the

> "rights extended to handicapped individuals under Title V, that is, . . . employment under federal contracts . . . are and will continue to be in need of constant vigilance by handicapped individuals . . . and the availability of attorney's fees should assist in vindi-

cating private rights of action in the case of section 502 and 503 cases, as well as those arising under section 501 and 504" (S.Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978)).

See also, Judge Goldberg's discussion in *Frito-Lay* of the legislative history and the senatorial comments of those intimately connected with the Act from the beginning. 611 F.2d at 1093-1098.

The court below agreed that in 1978 "Congress gave a clear expression of its assumption that it had created a private right of action in enacting section 503", but the court nevertheless concluded that "Congress did not intend to create a private right of action when it enacted section 503". It appears to be an unusual conclusion for the federal judiciary to make that the Congress did not intend certain action, when Congress by statute and clear legislative history indicates that Congress did so intend.[19] The ruling, it

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[19]Senator Birch Bayh in a Foreword to the *Symposium Issue on Employment Rights of the Handicapped*, 27 De Paul L.Rev. 943 (1978) stated:

"The right to work is one of the most basic of all our cherished rights. Work gives an individual not only economic self-sufficiency, but also a sense of dignity, self-worth, and the satisfaction of making a contribution to our society. Over the past decade, this nation has witnessed a growing awareness of the employment rights of many disadvantaged groups in our society. Women and minorities, under the protection of the Civil Rights Act of 1964, have begun to make substantial inroads into the labor market. Until the past few years, however, we have largely ignored the employment rights of another disadvantaged groups, our nation's handicapped. The federal government has made a commitment to end this 'unconscionable discrimination' against our nation's handicapped. Beginning in 1948, with the congressional enactment of Public Law 87-614, which prohibited the Federal Civil Service from discriminating against a person due to physical handicap, and ending with the signing of the final regulations implementing Section 504 of the Rehabilitation Act of 1973 . . . the federal government has established the legal framework with which to end employment discrimination for a majority of handicapped Americans. The federal government accepted this commitment on the grounds of both simple justice as well as economic

(footnote continued on following page)

is respectfully submitted, is akin to judicial legislation and an apparent disregard of the respect ordinarily accorded a co-equal arm of government.

Note, *Implying a Cause of Action Under Section 503 of the Rehabilitation Act of 1973*, 79 Mich.L.Rev. 1093, 1111-1112 (1981).

Only recently, the Court acknowledged that postenactment developments cannot be ignored concerning the scope and purpose of a statute. In *North Haven Board of Education v. Bell*, ___ U.S. ___ (May 17, 1982), Title IX of the Education Amendments of 1972 was given the broadest of constructions, not only because of its 1972 history, but also because of a congressional and administrative history extending into 1975. The Court on a number of occasions has paid deference to subsequent legislative express intent with

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considerations. To the extent that the skills of the approximately nineteen million handicapped Americans go untapped, our basic economy suffers. Regretably, the employment of handicapped individuals impairs not only their opportunity for self sufficiency, but frequently has ramifications for the nation, as these families frequently turn to welfare . . . . Congressional enactment of the Rehabilitation Act of 1973 may be one of the most important pieces of legislation in our nation's history. Its civil rights provisions have the potential to elicit fundamental changes in many facets of American life . . . . Even though various provisions of the Rehabilitation Act have been subject to only limited testing in the courts, some of the initial early cases brought on the basis of Section 501, 503, or 504 are encouraging. Others, however, have shown an unfortunate misunderstanding of both the obligations imposed by the law and the regulations as well as congressional intent in formulating the laws. It is particularly important to emphasize the desire of the Congress to make the Rehabilitation Act a sweeping guaranty of civil rights of the handicapped, particularly their employment rights. . . . While there is no definitive legislative history providing an explicit statement creating a private cause of action under Section 503, the reasoning of the federal district court in *Drennon v. Philadelphia Greater Hospital*, [428 F.Supp. 809 (E.D. Pa. 1977)] is persuasive. The court held that the absence of legislative history did not negate a private cause of action under the Rehabilitation Act." Senator Bayh played a major role in the Senate in connection with employment discrimination. See *North Haven Board of Education v. Bell*, ... U.S. .... (No. 80-986, May 17, 1982).

respect to statutes formerly enacted. *See, NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275, fn.8 (1974) ("We have also recognized that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381, fn.8 (1969) ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958) ("But the later law is entitled to weight when it comes to the problem of construction"). *See also, Fullilove v. Klutznick*, 448 U.S. 448 (1980).

The third and fourth *Cort* factors are also satisfied in this case, it is submitted. It is clearly consistent with the underlying purposes of the legislative scheme to imply a private action for the petitioner. Since only qualified handicapped individuals are protected under Section 503, there is no danger that private actions will result in inconsistent interpretations of the requirements of the act. Discrimination on the basis of handicap can only be justified if substantially related to business necessity, and courts already possess expertise in dealing with discrimination in other areas. Here, discretionary administrative enforcement relies ultimately on debarment for non-compliance. A private action seeking relief for an alleged violation is compatible with administrative enforcement, and is the only means of petitioner's receiving the personal rights granted him by Congress. The agency, in fact, has agreed that a private action would be an effective supplement to enforcement of Section 503.[19a]

[19a] "Moreover, even if alternative remedies are available and their existence is relevant, but cf. *Cannon v. University of Chicago*, 441 U.S. at 711; Comment, 129 U.Pa. L.Rev., at 442-446, this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination. See, e.g., *Electrical Workers v. Robbins and Myers, Inc.*, 429 U.S. 229, 236-239 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1975); *Alexander v. Gardener — Denver Co.*, 415 U.S. 36, 47-49 (1974)." *North Haven Board of Education v. Bell* ___ U.S. ___ n.26 (No. 80-986, May 17, 1982).

The argument that judicially applicable standards are not available also appears without merit. The vast experience of the courts in dealing with equal opportunity concepts, and with discrimination based on criteria unrelated to job performance, indicates that the courts can deal with discrimination on the basis of handicap to fashion an appropriate judicial remedy.

Finally, virtually all courts are agreed that protection from employment discrimination for the handicapped has not been an area of traditional state interest or concern. The federal government has been instrumental in combatting employment discrimination against the handicapped

In *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977), the Court held the tender offeror did not have an implied remedy against the management of the target corporation under provisions of the Securities and Exchange Act. The Court held that the sole purpose of the statute was the protection of investors; that tender offerors, the class regulated by the statute, were not the intended beneficiaries of the legislation. The first *Cort* factor was not even met. The Court did reiterate, however, in *Chris-Craft* that "where Congressional purposes are likely to be undermined absent private enforcement, private remedies may be implied in favor of the particular class intended to be protected by the statute" (430 U.S. at 25), pointing to *Borak*. Moreover, again distinguishing *Borak*, the Court found no basis to support the argument that a damage action in favor of the regulated offeror would ensure the fulfillment of Congress' purpose to protect the investors. 430 U.S. at 41.

Cannon v. University of Chicago, 441 U.S. 677 (1979), a discrimination case under Title IX, again resulted in an implied private action. The *Cort* factors were all satisfied. The Court noted that with one exception, not relevant here,

"this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case" (441 U.S. at 690, fn. 13). The *Cannon* decision recognized that mere legislative silence is no reason for denying a plaintiff a judicial remedy where the legislature has granted a class of persons federal rights (441 U.S. at 694). The Court recognized that in evaluating congressional intent in 1972, the Court "must take into account its contemporary legal context" (441 U.S. at 698-699). Again, the Court found a private action entirely consistent with the purposes of the law and necessary for its enforcement. If the use of federal resources to support discriminatory practices is to be avoided, and individual citizens given effective protection against these practices, then the award of individual relief to a private litigant might not only be sensible, instead of an entire cut-off of funds, "but it is also fully consistent with — and in some cases even necessary to — the orderly enforcement of the statute" (441 U.S. at 706). Finally, this Court observed that provision for an administrative remedy in the law was not in itself a ground for assuming that Congress had not intended an otherwise appropriate judicial remedy for the class benefited by the statute. (441 U.S. at 711).

The *Cort* and *Cannon* decisions pointedly support the implication of a private action under Section 503. Each of the factors are satisfied: the grant of federal rights, congressional intent revealed in the text and legislative history, the consistency of a private action with the effective enforcement of the statute, and the matter involved one of particular federal concern.

The subsequent rulings of the Court, where private actions were not implied, are substantively distinguishable from the proceedings herein. Thus, in *Touche Ross & Co. v. Red-*

ington, 442 U.S. 560 (1979), customers of a broker-dealer were suing an accounting firm for damages under a provision of the Securities and Exchange Act. The Court determined that nothing in the statutory language or legislative history gave the slightest evidence that Congress intended, explicitly or implicitly, to create a private action. The Court recognized, however, that implied private remedies might arise where "the statute in question at least prohibited certain conduct or created federal rights in favor of private parties" (442 U.S. at 569).

In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court stated: "This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available" (444 U.S. at 18). The Court decided that since Section 215 of the Investment Advisers Act of 1940 made certain advisers contracts "void", a right to specific relief could be implied. The power to avoid a contract includes the right to resort to a court to have the contract rescinded and to obtain restitution of consideration paid, it was stated. Petitioner discusses hereafter the significance of the contract requirements of the statute and regulations which Congress specifically intended for his benefit as an additional basis for the implication of private action. As to the other section of the statute in *Transamerica*, the Court declined to find an implied action in the light of the many specific criminal and civil penalties provided in the law.

In *Universities Research Ass'n., Inc. v. Coutu*, 450 U.S. 754 (1981), the Court declined to imply a private contract action for back wages under the Davis-Bacon Act where it had been administratively determined that the contract did not call for work subject to the act and therefore did not contain prevailing wage stipulations. The Court held that

the legislative history indicated a clear intent on the part of Congress not to create a private remedy where there were no prevailing wage stipulations in the contract. The Court left open, however, the question of whether the act creates an implied private right of action to enforce a contract that contains specific Davis-Bacon Act stipulations (450 U.S. at 769).

In *California v. Sierra Club*, 451 U.S. 287 (1981), the action was by private parties suing under the Rivers and Harbors Appropriation Act of 1899. It was sought to enjoin the construction and operation of certain water diversion facilities. This Court held that "the four factors specified in *Cort* remain the criteria through which this (congressional) intent could be discerned" (451 U.S. at 293). The Court held that the statute and the legislative history clearly indicated that "Congress was concerned not with private rights but with the Federal Government's ability to respond to obstructions on navigable waterways" (451 U.S. at 296).

Finally, at the close of the October 1981 term, the Court, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 102 S.Ct. 1825 (May 3, 1982), implied a private action or actions under the Commodity Exchange Act by investors in futures contracts against commission merchants or brokers. Again, pointing to *Cannon*, the Court noted that the mere failure to explicitly provide for a private remedy did not mean that Congress did not intend "to have such a remedy available to the persons benefited by its legislation" 102 S.Ct. at 1837. More important, stated the Court, at the time of the comprehensive amendments to the act in 1974, the federal courts routinely recognized an implied private cause of action. Therefore, evaluation of congressional action "must take into account its contemporary legal context" 102 S.Ct. at 1841.

> "More precisely, we must examine Congress' perception of the law that it was shaping or reshaping . . . it is always appropriate to assume that our elected representatives, like other citizens, know the law" Id.

As petitioner has heretofore shown, at the time of the enactment of the Rehabilitation Act, including Section 503, in 1973, the Court uniformly implied private actions in cases where Congress, by its enactments, intended to create federal rights, and in the civil rights areas where the broad remedial enactments required full effectuation by private judicial remedies.

IV.

SECTION 503 CREATES A PROPERTY ENTITLEMENT IN PETITIONER AND VINDICATION OF PETITIONER'S ENTITLEMENT BY A PRIVATE ACTION WOULD SATISFY DUE PROCESS AND EFFECTUATE CONGRESSIONAL PURPOSES.

In the context of a law entitled the Rehabilitation Act, expressly intended to protect the rights of handicapped persons, it is a basic misconception to view the law as merely imposing a duty on the regulatory agency and a corresponding duty by the federal contractor solely to the agency. Such a thesis totally disregards the wishes of Congress and the purposes of the law. In effect, despite the plain purpose, reflected in the law, legislative history and regulations, to vest personal rights in the handicapped, the mere lack of a verbal formula is employed to undermine legislative authority.

The purpose of Section 503 is the protection of the basic personal rights of handicapped persons. The statute created a protected property entitlement in the petitioner here. The entire purpose of the statute and the regulations is to vindicate the individual entitlements of qualified handicapped

persons seeking employment, and private rights of action are needed to effectuate that purpose.

The statute mandates an affirmative action contract "to employ and advance in employment qualified handicapped individuals" and "if any handicapped individual" believes that there has been a violation or refusal to comply with the agreement, it is the handicapped individual who may file a complaint. 29 U.S.C. Section 793(a)(b). The contract required by the regulations (41 CFR, 60-741.4) provides, among other things, that

> "the contractor will not discriminate against any employee or applicant for employment because of physical or mental handicap in regard to any position for which the employee or applicant for employment is qualified".

The statute and the regulations are plainly intended to confer rights and benefits upon the handicapped. While duties have been laid upon the agency and contractor, the intended beneficiary of the performance of these duties is the qualified handicapped individual. The rights of that individual were and are Congress' angle of vision.

It is unnecessary here, it is submitted, to explore ordinary contract analysis involving third party beneficiaries. Privity of contract between the plaintiffs and defendants has never been a fixed condition precedent to the implication of a private remedy for a statutory violation that injured the plaintiffs, members of the protected class. Whether the statute deals with federal assistance grants to state programs or agreements with federal contractors, the important fact is that the limitations contained in the grant or the provisions in the contract are actually additional evidence to support the individual's entitlement, to support the ability to enforce a statutorily authorized vested federal right.

> "The common law itself is inevitably a trilateral set of relations among rightholders, duty bearers, and government. The existence of that trilateral relation has not inhibited the recognition of entitlements on the part of rightholders to government protection of their rights against defaulting duty-bearers."

Stewart and Sunstein, *Public Programs and Private Rights*, 95 Harv.L.Rev. 1195, 1311 (1982).

In *Lau v. Nichols*, 414 U.S. 563 (1974), the suit was by students against the school district receiving federal financial assistance under provisions of the Civil Rights Act of 1964. This Court noted that the "school district contractually agreed" to comply with the statute and all requirements imposed by the HEW regulations and that violation of that agreement called for the "fashioning of appropriate relief" to the students. 414 U.S. at 568-569.

Again, in *Rosado v. Wyman*, 397 U.S. 397 (1970), the class benefited were welfare recipients. The federal statute, an assistance program under the Social Security Act, invalidated any state program (receiving the federal funds) that substantially altered the content of the need of the welfare individuals in such a way that it was less than it was prior to the enactment of the specific provision of the federal law.

> "We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program." 397 U.S. at 420.

See also, Gomez v. Florida State Employment Service, 417 F.2d 569 (5 Cir. 1969).

The recent decision of the Court in *Logan v. Zimerman Brush Co.*, ___ U.S. ___, 102 S.Ct. 1148 (1982), recognizes the rights of regulatory beneficiaries and details the broad scope of individual entitlements, "types of interests

. . . relating to the whole domain of social and economic fact" (102 S.Ct. at 1155).

In short, the private right of action here against the federal contractor is a means of securing due process protection for the entitlement which Congress has specifically bestowed.

Conclusion.

The evidence garnered from the text of the statute, its legislative history and avowed purposes, firmly establish that Congress contemplated private enforcement of Section 503. Congress intended that the private right of action by the handicapped individual would ensure the enforcement of specific congressional policies. The judicial function is appropriately exercised when, consistent with the intent of the people's representatives, private remedies are provided to effectuate and enforce the legislative will. The implication of private action under Section 503 would be consistent with law and simple human justice.

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Dated: June 18, 1982.

Respectfully submitted,

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APPENDIX A.

William Fisher, Plaintiff-Appellant, v. City of Tucson, an incorporated municipality, Defendant-Appellee. No. 78-1251.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 14, 1980. Decided Nov. 23, 1981.

Action was brought against city for alleged violation of the Rehabilitation Act. The United States District Court for the District of Arizona, Mary Anne Richey, J., entered judgment dismissing complaint, and appeal was taken. The Court of Appeals, Hug, Circuit Judge, held that, although Congress did intend to create federal rights on behalf of handicapped individuals by enacting section of the Act requiring government contractors to take affirmative action to employ handicapped persons, there was no implied private right of action under such section of the Act.

Affirmed.

Fletcher, Circuit Judge, concurred in part and dissented in part and filed opinion.

Appeal from the United States District Court for the District of Arizona.

Before HUG, FLETCHER and FARRIS, Circuit Judges.

HUG, Circuit Judge:

This is an action brought by the appellant, William Fisher, alleging that the City of Tucson, Arizona violated section 503 of the Rehabilitation Act of 1973 in failing to hire him as an industrial electronics technician. Section 503 mandates that "[a]ny contract in excess of $2,500 entered into by any Federal department or agency . . . contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take af-

firmative action to employ and advance in employment qualified handicapped individuals." 29 U.S.C. § 793(a).[1] Fisher, who suffers from a physical handicap, argues that the City of Tucson violated section 503, first by discriminating against him on the basis of his handicap, and second by failing to fulfill its contractual obligation to take affirmative action to employ qualified handicapped individuals.

Section 503 does not expressly provide that its provisions may be enforced through a private right of action. Rather, the statute provides that a handicapped individual who believes that a government contractor has failed to comply with its provisions may file a complaint with the Department of Labor. 29 U.S.C. § 793(b).[2] The district court, finding that an implied private right of action did not exist under section 503, dismissed Fisher's complaint for failure to state a claim. Thus the sole issue before us on appeal is whether

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[1]29 U.S.C. § 793(a) provides:

> Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and non-personal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of his section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

[2]29 U.S.C. § 793(b) provides:

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

we may find an implied right of action in section 503. Because we find insufficient legislative intent to create a private right of action to enforce the mandates of section 503, we affirm the judgment of the district court.

I

Facts

For purposes of this appeal, we must assume the truth of the facts alleged in Fisher's amended complaint. The complaint states that Fisher has considerable educational and practical experience in the field of electronics. He received the highest score on a civil service test administered by the City of Tucson (the "City") for the position of "industrial electronics technician I," and was subsequently invited, with two other persons, to a final interview. During his interview, Fisher told officials that he had a lower back injury, for which treatment was required. One of the other applicants was hired. The complaint states that Fisher was told that he was denied employment due to his physical disability. Fisher claims that he is well-qualified for the job and physically capable of performing it.

Shortly thereafter, Fisher filed a complaint with the Department of Labor ("DOL"). The DOL investigated the complaint and determined that Fisher was a "handicapped individual" within the meaning of 29 U.S.C. § 706(7) and that the City was a federal contractor within the definition of section 503, but that the City had not violated section 503 in refusing to hire Fisher. The DOL determined that no further action on Fisher's complaint was warranted.[3] Fisher then instituted this proceeding.

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[3]The administrative enforcement scheme is provided at 41 C.F.R. §§ 60-741.1 through 60-741.54.

II
Analysis

The Supreme Court has stated that four factors are relevant in determining whether a private right of action may be implied to enforce the provisions of a statute which does not expressly provide such a right:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975) (citations omitted). In a more recent case, the Court has emphasized that in applying the *Cort v. Ash* analysis, the ultimate issue remains "whether Congress intended to create a private right of action." *State of California v. Sierra Club*, ____ U.S. ____, ____, 101 S.Ct. 1775, 1779, 68 L.Ed.2d 101, 107 (1981). It cannot be overemphasized that the "ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 99 S.Ct. 2479, 2490, 61 L.Ed.2d 82 (1979). We examine the *Cort v. Ash* factors, then, in an attempt to determine from the statute and the circumstances surrounding its enactment whether Congress intended to create a private right of action.

A. Is the plaintiff one for whose benefit the statute was enacted?

In *California v. Sierra Club*, the Court emphasized that the first *Cort v. Ash* factor requires not only a consideration of whether the plaintiff is a member of the class for whose benefit the statute was enacted, but also whether "Congress intended to confer federal rights upon those beneficiaries." ___ U.S. at ___, 101 S.Ct. at 1780, 68 L.Ed.2d at 108. Otherwise, the Court stated, any crime victim "would be deemed an especial beneficiary of the criminal statute's proscription." *Id.* ___ U.S. at ___, 101 S.Ct. at 1779, at 107.

In *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980), in which a divided panel of the Fifth Circuit concluded that section 503 does not create a private right of action, the court found that the statute did not confer a right in favor of handicapped individuals. *Id.* at 1079-80. While we agree with the Fifth Circuit's ultimate conclusion that section 503 does not create a private right of action, we do find that the statute creates a federal right on behalf of the protected class. Clearly the statute was intended to benefit handicapped persons. The statute also provides that any handicapped individual who believes that a contractor is not in compliance with his contract may file a complaint with the DOL, which has investigatory and enforcement powers. 29 U.S.C. § 793(b).[4] It seems apparent that Congress did intend to confer some federal rights on handicapped individuals. However, the fact that these rights were conferred on handicapped individuals does not necessarily lead us to conclude that Congress intended to create a private right of

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[4]The text of 29 U.S.C. § 793(b) is reproduced in n.2 *supra*.

action to enforce them. To the contrary, Congress could well have intended to limit the exercise of these rights to the context of the administrative enforcement scheme. The question whether Congress did so limit the exercise of these rights is resolved through an examination of the second and third *Cort. v. Ash* factors.

B. Expressions of Legislative Intent

1. The Statute

In attempting to determine whether Congress created a private right of action under Section 503 of the Rehabilitation Act, it is helpful to compare it to section 504 of the Act, 29 U.S.C. § 794,[5] which has been held to imply a private right of action. *Kling v. County of Los Angeles*, 633 F.2d 876 (9th Cir. 1980). Section 503 does not, on its face, prohibit discrimination against handicapped persons. Rather, it requires that certain employers who contract with the federal government take affirmative action to employ and promote qualified handicapped individuals. Section 504 of the Act, on the other hand, specifically prohibits discrimination against handicapped individuals in any program or activity receiving federal financial assistance.

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[5]29 U.S.C. § 794 provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation shall take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

To the extent that section 503 does not expressly prohibit discrimination against the handicapped, it is unlike both section 504 and Title IX, which the Supreme Court found in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), to have created an implied right of action. Significantly, the Court stated in *Cannon* that "[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefited class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." *Id.* at 690-93, 99 S.Ct. at 1954-56 (footnote omitted). While *Cannon* does not require us to find this consideration determinative in the instant case, clearly section 503, unlike section 504, is similar to the hypothetical statutes distinguished from Title IX by the Court in *Cannon*.

A consideration of perhaps even greater significance here is that Congress has not expressly made discrimination against handicapped individuals unlawful in section 503, but rather has mandated that contractors discriminate *in favor of* handicapped individuals by implementing affirmative action programs. It is no doubt true that the affirmative action requirement impliedly mandates that contractors not discriminate against the handicapped. In addition, regulations promulgated pursuant to section 503 require that the contractor agree not to discriminate against handicapped persons.[6] At the same time, the affirmative action requirement reflects congressional concern for the class, rather than the individual. The administrative remedy provision provides support for this interpretation in specifying that when

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[6]41 C.F.R. § 60-741.4

a handicapped person believes that a contractor is not in compliance with the provision of his contract relating to the employment of handicapped *individuals*, he or she may file a complaint with the DOL. The Department presumably would then investigate the contractor to determine whether an adequate affirmative action program is in force. It would be going substantially further for us to conclude that an individual may file a private action to force a contractor to discriminate in his favor.

For example, in this case Fisher has complained both that he has been discriminated against and that the City is not in compliance with the affirmative action clause. It is unclear how we might find an implied right of action to enforce the nondiscrimination component of section 503, and not find the same right to enforce the affirmative action component, especially in light of the fact that discrimination is not even expressly prohibited by the statute. We are aware of no situation in which Congress has expressly created a private right of action in favor of individuals to enforce an affirmative action law. It seems to us we would be venturing too far into the legislative domain to find that Congress created such a right by implication. In addition, in the absence of congressional guidance, many questions regarding such a right of action are unanswered. Would the aggrieved party sue the contractor for failing to implement a program, or the United States for failing to adequately supervise the contractor? Would the individual seek personal relief or, instead, a court order that the affirmative action plan be implemented? Finally, the plain language of the statute reflects that Congress left the supervision of contract com-

pliance with the DOL.[7] These factors all lead to the conclusion that Congress did not intend to create a private right of action to enforce section 503.

2. Legislative History

A review of the pertinent legislative history of section 503 leaves us unable to conclude that Congress intended to create a private right of action. As is noted in both the majority and dissenting opinions in *Rogers v. Frito-Lay*, there was very little discussion of section 503 at the time of the statute's enactment. Most of the debate at that time was focused on the spending provisions relating to other sections of the Act, although Senator Cranston did introduce a statement by Senator Humphrey to the effect that he believed that sections 503 and 504 would accomplish what he had earlier sought to achieve through amendments to Titles VI and VII of the Civil Rights Act of 1964. 118 Cong.Rec. 32310 (1972).

Congress amended the Act in 1974, but the amendment dealt principally with the definition of a handicapped individual, and did not relate to the substance of section 503 or 504. There was discussion in a conference report of the manner and means of the enforcement of these sections, although the primary was on section 504. *See* S.Conf.Rep. No. 93-1270, 93d Cong., 2d Sess. 25-28 (1974). The report states that section 504 was patterned after Titles VI and IX, and that section 504 created a private right of action. In the

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[7]Because the issue was not raised before us, we reach no conclusion regarding the question whether Fisher might bring an action against the Department of Labor under the Administrative Procedure Act, 5 U.S.C. § 702, alleging that the Department has failed to enforce the Act's affirmative action requirement. *See Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1330-32 (9th Cir. 1979), *cert. denied, sub. nom. Chamber of Commerce of the United States v. Legal Aid Society of Alameda County*, 447 U.S. 921, 100 S.Ct. 3010, 65 L.Ed.2d 1112 (1980).

same report, it is stated that sections 503 and 504 are to be administered in such a way that a consistent, uniform and effective federal approach to discrimination against the handicapped could result. In addition, Senator Stafford stated on the floor of the Senate that it was the intent of the Senate Committee on Labor and Public Welfare that the enforcement of sections 503 and 504 would be similar to that under Title VI of the Civil Rights Act and Title IX of the Educational Amendments of 1972. 120 Cong.Rec. 30551 (1974).

We find none of these statements decisive regarding section 503, however. A consistent, uniform approach to discrimination does not require that the statute be enforced through a private right of action. Similarly, the statement that the enforcement of sections 503 and 504 should be "similar to" that under Titles VI and IX falls short of giving a clear indication that a private remedy was intended.

In 1978 Congress gave a clear expression of its assumption that it had created a private right of action in enacting section 503 five years earlier through the addition of a new section, section 505, which provided that a prevailing party would be awarded attorney's fees, at the trial court's discretion, in any action to enforce the chapter. The Senate report specifically refers to the applicability of section 505 to section 503. S.Rep.No. 95-890, 95th Cong., 2d Sess. 19 (1978), U.S. Code Cong. & Admin.News 1978, p. 7312. Senator Bayh and Senator Cranston both stated that it was their understanding that private suits were authorized under all of Title V. 124 Cong. Rec. S 15593 (daily ed. Sept. 20, 1978).

As acknowledged by both the majority and dissenting opinions in *Rogers v. Frito-Lay*, the 1978 amendment and the circumstances surrounding its enactment give no evidence of congressional intent to amend section 503 to create

a private right of action, but rather reflect Congress's understanding or assumption that a private right of action had been created in 1973. The fact that many of those persons involved in enacting section 505 held this view lends credence to their interpretation of the statute.

However, while the interpretation of an Act of an earlier Congress by a later one "does shed some light on the intent of the enacting Congress," it is clear that the interpretation "is not by any means dispositive." *Chrysler Corp. v. Brown*, 441 U.S. 281, 299-300, 99 S.Ct. 1705, 1716, 60 L.Ed.2d 208 (1979). While we give weight to the 1978 amendment, we do not find that it compels us to conclude that a private right of action was created when the statute was originally enacted. The 1978 amendment and the circumstances surrounding its enactment are the only clear indications that a private right of action does exist under section 503. There is no other legislative history which clearly supports that conclusion. Notably absent is any indication that Congress intended to launch into a new area by providing a private right of action to enforce an affirmative action law. Nor is there an indication of how such a right would be enforced. Taken together, the express language of the statute and the legislative history surrounding the Act and its subsequent amendments lead us to conclude that Congress did not intend to create a private right of action when it enacted section 503.

C. Is a private remedy consistent with the underlying purpose of the legislative scheme?

In his dissent in *Rogers v. Frito-Lay*, Judge Goldberg argued that a private remedy would complement the administrative enforcement scheme. In support of his position, he cited the Department of Labor's position that section 503 does imply a private right of action, and that the prospect

of litigation would have the effect of promoting rather than hindering the Department's enforcement efforts. 611 F.2d at 1102-1107. The majority in *Rogers*, on the other hand, found that "the provision of an express administrative remedy . . . creates at least some basis to conclude that a private right of action would be inconsistent with the purposes of the legislative scheme." *Id.* at 1084.

In determining whether a private right of action would be consistent with the legislative scheme we consider both the presence of the administrative enforcement mechanism and the nature of section 503's mandate: that contractors undertake affirmative action to employ and promote handicapped individuals. We believe it is reasonable to conclude that Congress intended to leave the supervision of the affirmative action programs to the DOL. As we discussed above, it is unclear what role an individal would have in seeking to enforce the affirmative action provision in a private suit.

For example, in this case Fisher brought his suit after the Department found he was not qualified for the position with the City. Were we to find a private right of action implied in section 503, we would not be reviewing the agency determination. Rather, on remand, the district court presumably would have to hear evidence regarding both Fisher's claim that he was discriminated against and his assertion that the City has failed to implement an affirmative action program. The first inquiry would constitute a duplication of the Department's already-completed investigation; we question whether that result was intended by Congress. The second inquiry would require us to review the City's affirmative action plan. Again, it seems reasonable to us that Congress meant what it said in enacting the statute—that this investigatory function was left to the Department. We thus conclude that a private right of action is inconsistent

with the scheme provided by Congress. It is not the function of the court to consider whether the current enforcement mechanism is the best method to effectuate the purposes of the Act; our function is to determine the intent of Congress.

D. Is the cause of action one traditionally relegated to state law?

This area is clearly one of federal concern. Since the civil war, individual rights have been a primary concern of the federal government.

III

Conclusion

In summary, in determining whether Congress intended to create a private right of action, we have employed the framework of analysis suggested by the Supreme Court in *Cort v. Ash*. We find that in enacting section 503, Congress did intend to create federal rights on behalf of handicapped individuals and that the rights of the handicapped are properly the concern of the federal government. These findings are not determinative, however, regarding the question of whether Congress intended to provide a private right of action to enforce section 503, for they would be equally consistent with the conclusion that Congress meant to provide only the administrative enforcement scheme. Indeed, a consideration of the other two *Cort v. Ash* factors leads us to conclude that Congress did not intend to create a private right of action.

The statute does not, on its face, prohibit discrimination. Instead, it requires that contractors implement affirmative action programs. Further, Congress has provided an administrative enforcement scheme with which the exercise of a private right of action might well conflict. Finally, we are unable to discern a clear indication in the legislative

history that Congress intended to create a private right of action. Under these circumstances, we decline to imply what Congress failed to expressly provide.

The judgment of the district court is AFFIRMED.

FLETCHER, Circuit Judge, concurring and dissenting:

I dissent from the majority's holding that handicapped individuals do not have a private right of action under section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (1976 & Supp. II 1978). I agree with the majority that section 503 creates no explicit remedy authorizing handicapped individuals to sue federal contractors in federal court. I likewise agree that the court must undertake an analysis along the line of that pursued by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), to determine whether a private right of action should be implied. The majority concludes that the first and fourth criteria of the quadripartite test spelled out in *Cort v. Ash* are met[1] To this extent, I concur in the majority's opinion.

The second part of the *Cort v. Ash* test is an inquiry into whether there is "any indication of legislative intent, explicit or implicit, either to create [a private right of action]

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[1]By contrast, other circuits that have considered whether section 503 creates a private right of action have denied that section 503 was enacted for the especial benefit of handicapped persons, the first *Cort* factor; the same circuits have also found that the fourth *Cort* factor is met *i.e.*, the action is not one traditionally relegated to state law. *See Davis v. United Airlines*, No. 81-7093, slip op.at 4857, 4862-63, 4872, ____ F.2d ____ at ____, -____, ____ (2d Cir. Sept. 17 1981); *Simpson v. Reynolds Metal Co.*, 629 F.2d 1226, 1238 n. 23, 1239-40 (7th Cir. 1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1078 n.4, 1079-80 (5th Cir.), *cert denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980).

or to deny one." 422 U.S. at 78, 95 S.Ct. at 2088.[2] Contrary to the majority's view, I would find the requisite congressional intent to create a private judicial remedy.

In 1978, Congress amended the Rehabilitation Act to add section 505, 29 U.S.C. § 794a (Supp. II 1978). Subsection (b) of section 505 provides that:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

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[2]Congress gave little attention to the section at the time of its enactment. Discussion of the Rehabilitation Act focused primarily on federal programs for the handicapped. *See* S.Rep. No. 93-318, 93rd Cong. 1st Sess., *reprinted in* [1973] U.S. Code Cong. & Ad. News 2076. The legislative history of the 1974 amendments to the Rehabilitation Act provide only slightly more guidance. The discussion of the 1974 amendments focused on redefining the term "handicapped individual." The Conference Report on the 1974 Amendments, however, clearly indicated a congressional understanding that section 504 of the Act permits a "judicial remedy through private action." S.Conf.Rep. No. 93-1270, 93d Cong.2d Sess., 27 (1974). Significantly, the report goes on to indicate that section 503 should be administered consistently with section 504, thereby suggesting that a private right of action would be consistent with Congress' purposes in section 503. The Senate debate remarks of Senator Robert Stafford, a sponsor of the original act and the 1974 amendment, confirm this interpretation of section 503. Senator Stafford stated that enforcement of sections 503 and 504 would parallel enforcement of section 601 of the Civil Rights Act and section 901 of the Education Amendments of 1972. 120 Cong.Rec. 30551 (1974). Both section 601 and section 901 include a private right of action. *See Cannon v. University of Chicago*, 441 U.S. at 694-95, 717, 99 S.Ct. at 1956-58, 1968 (discussing the implied private right of action under section 601 and finding such a right under section 901).

To the extent that the Supreme Court discounts the use of subsequent legislative history to imply a private cause of action in *Cannon*, 441 U.S. at 686 n.7, 99 S.Ct. at 1952 n.7, that case is distinguishable. In *Cannon* the Court had not only subsequent legislative history but also extensive contemporaneous legislative history on which to rely. By contrast, in this case we have scant contemporaneous legislative history but replete subsequent history and legislation. Consequently, there is more reason here to turn to the later history and legislation.

In 1978, at least, Congress believed that a private right of action was available to enforce section 503. In fact, it believed that it was modifying the section 503 remedy by providing attorney's fees and costs to the prevailing party, other than the Government. *See* H.R.Rep. No. 95-1149, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 7312, 7332. In *Red Lion Broadcasting Co. v. Federal Communications Comm'n*, 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969), the Supreme Court stated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Id.* at 380-81, 89 S.Ct. at 1802-02; *accord, Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 n.13, 100 S.Ct. 2051, 2061 n.13, 64 L.Ed.2d 766 (1980); *See Andrus v. Shell Oil*, 446 U.S. 657, 666 n.8, 100 S.Ct. 1932, 1938 n.8, 64 L.Ed.2d 593 (1980); *Montana Wilderness Ass'n v. U.S. Forest Service*, 655 F.2d 951, 957 (9th Cir. 1980). The majority agrees that Congress intended section 505 to provide attorney's fees in a private action to enforce section 503. Maj. Slip Op. at 6019, at ____. But it does not find the 1978 congressional interpretation of section 503 a persuasive indicator of what congressional intent was in 1973 when section 503 was enacted.

I disagree strongly. I rely on more than subsequent history interpreting an earlier statute. *Compare Consumer Products Safety Comm'n v. GTE Sylvania*, 447 U.S. at 118 n.13, 100 S.Ct. at 2061 n.13. Section 505 is premised on the interpretation of Section 503 that I urge,[3] and committee

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[3]Section 505 explicitly presumes private judicial actions. It provides that "the court," not the Department of Labor, may award attorneys fees. Further, section 505 precludes an award of attorney's fees to the United States and hence to the Office of Federal Contract Compliance Programs. Thus the only persons that may benefit from the section 505 attorney's fees provision under section 503 are individuals who prevail in a private judicial action to enforce section 503. *See Davis v. United Airlines*, No. 81-7093, slip op. at 4875-76, ____ F.2d ____, at ____ (2d Cir., Sept. 17, 1981) (Kaufman, J., dissenting).

reports on section 505 confirm that Congress understood section 503 to include a private enforcement right.[4] Significantly, the 1978 committees that reported on section 505 and the 1973 committees responsible for section 503 were composed of many of the same members of Congress. *Compare* [1978] U.S. Code Cong. & Ad. News XCIX, CXVII *with* [1973] U.S. Code Cong. & Ad. News LXXXIV, XCVIII. Thus both section 505 and the 1978 committee reports are entitled to substantially more weight than the majority accords them.[5]

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[4]The report on the Senate bill, the source of section 505, states:

> The committee believes that the rights extended to handicapped individuals under Title V, that is, Federal government employment, physical accessibility in public buildings, *employment under federal contracts*, and non-discrimination under federal grants—are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance and *the availability of attorney's fees should assist in vindicating private rights of action in the case of section 502 and 503 cases*, as well as those arising under section 501 and 504.

S.Rep. No. 95-890, 95th Cong. 2d Sess, 19 (1978) (emphasis added). This report provides unimpeachable evidence that Congress intended section 505 to provide attorney's fees in a private suit to enforce section 503. Therefore, Congress must have interpreted section 503 to include a private enforcement right.

[5]The majority also argues that we should ignore Congress' interpretation of section 503 because section 503 does not parallel several anti-discrimination statutes for which private rights of action have been implied. I agree that section 503 does not parallel these statutes, but I am not sure what significance to draw from this distinction. The fact that private rights of action have been inferred from other statutes differently structured does not mean that a private right of action cannot be inferred from section 503.

To the extent that the majority's comparison of statutory structures is meant to invoke the distinction between right-creating and duty-creating statutes, that distinction is inapplicable here. In *Cannon* the Supreme Court observed that it is more willing to imply a cause of action under a right-creating statute than under a duty-creating statute. 441 U.S. at 690 n.13, 99 S.Ct. at 1954. Each court of appeals to consider fully section 503 has invoked this advice to conclude that no cause of action should be implied under section 503, a duty-creating statute. *See, e.g., Davis v. United Airlines*, No. 81-7093, slip op. at 4862-63, ——— F.2d ———, at ———— (2d (Cir. Sept. 17, 1981); *Simpson*

Had the majority not found that section 503 was passed for the especial benefit of handicapped persons, its reluctance to find a private judicial remedy could be more easily understood. However, when the first *Cort* factor has been met, as the majority agrees it has, Maj. Slip Op. at 6016, at ___, "it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Cannon v. University of Chicago*, 441 U.S. 677, 694, 99 S.Ct. 1946, 1956, 60 L.Ed.2d 560 (1979) (quoting *Cort*, 422 U.S. at 82, 95 S.Ct. at 2090) (emphasis in original). *See Northwest Airlines v. Transport Workers Union*, ___ U.S. ___, 101 S.Ct. 1571, 1580-81, 67 L.Ed.2d 750 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 100 S.Ct. 242, 246, 62 L.Ed.2d 146 (1979). There is not a shred of evidence to indicate that Congress intended to *deny* a private right to enforce section 503. There is, however, strong and unequivocal evidence, which is entitled to "great weight," that Congress intended to *create* an implied right of action to enforce section 503. The absence of any intent to deny a private cause of action together with the clear congressional intent to create such a cause of action

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v. Reynolds Metals Co., 629 F.2d 1226, 1239 (7th Cir.1980); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1079-80 (5th Cir. 1980). Recourse to the right/duty distinction is not persuasive, however, in an analysis of section 503. First, the Supreme Court did not suggest that a cause of action can never be implied uner a duty-creating statute. *Cannon*, 441 U.S. 690 n.13, 99 S.Ct. at 1954 n.13. In fact it can. *Id* (citing, *inter alia*, *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) and *Machinists v. Central Airlines*, 372 U.S. 682, 83 S.Ct. 956, 10 L.Ed.2d 67 (1963)). Moreover, section 503 presents a more compelling case for implying a cause of action under a duty-creating statute than either *Borak* or *Central Airlines*. In both of those cases, the duty ran to the general public; in section 503 the duty runs to a specially benefitted class. Consequently, section 503 is more closely akin to the Title IX provision interpreted in *Cannon* than to general duty-creating statutes. *See Rogers*, 611 F.2d at 1089-90 (Goldberg, J., dissenting)

provides compelling evidence that favors implication of a private judicial remedy under section 503.

The third inquiry under *Cort* is whether the "underlying purposes of the legislative scheme" are consistent with private enforcement. 422 U.S. at 78, 95 S.Ct. at 2088. The majority concludes that a private right of action would be inconsistent with the legislative scheme established by section 503 because section 503 contains provisions for investigation and enforcement by the Department of Labor (DOL). Maj. Slip Op. at 6020-6021 at ____-____. I find this view puzzling. Dual enforcement schemes are commonplace. Title VI and Title IX both include provisions for administrative enforcement, *see* 42 U.S.C. § 2000d-1 (1976) (Title VI); 20 U.S.C. § 1682 (1976) (Title IX), but private rights of action have nevertheless been inferred from both statutes. *See also* 42 U.S.C. § 2000e-5(b) (1976) (Title VII) (allowing private right of action after exhausting administrative remedies); *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969) (finding private right of action under Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976), despite provisions for enforcement by Attorney General).[6]

The majority also argues that a private cause of action under section 503 would be difficult to administer. Maj. Slip. Op. at 6021 at ____. This may or may not be the case, but is in any event irrelevant. The inquiry to be made is whether the legislative scheme and private enforcement are consistent, *Cort*, 422 U.S. at 78, 95 S.Ct. at 2088, not

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[6] If Congress had wished to make the DOL enforcement provisions exclusive, it could have said so explicitly. For example, the enforcement article of the Age Discrimination Act, 42 U.S.C. § 6104(e) (1976), provides that "the provisions of this section shall be the exclusive remedy for the enforcement of the provisions of this chapter." No such 'exclusive remedies" provision appears in section 503.

whether the two schemes are difficult or burdensome to administer. On the question of consistency, some deference is due the agency responsible for enforcing section 503 (here the Department of Labor). *See, e.g., Miller v. Youakim*, 440 U.S. 125, 144, 99 S.Ct. 957, 968, 59 L.Ed.2d 194 (1979); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1985); *Takazato v. F.M.C.*, 633 F.2d 1276, 1278 (9th Cir. 1980). The DOL finds no inconsistency between private and administrative enforcement; rather, it has expressed repeatedly its opinion that a private right of action would complement the administrative mechanism.[7]

Nor should we overlook the striking similarities in the legislative schemes of section 503 and Title IX. For example, both Title IX and section 503 have similar objectives. Both confer benefits on a specific class of persons, neither section expressly affords private relief for the complainant, and both sections grant the administrative agency wide investigatory discretion.[8] In *Cannon*, the Supreme Court found an implied right of action consistent with the Title IX enforcement scheme. *Cannon*, 441 U.S. at 717, 99 S.Ct. at 1968. I find no reason to reach a different result here in respect to section 503.

Conclusion

Just as the court in *Cannon* found with respect to Title IX, I find with respect to section 503 of the Rehabilitation Act, "the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present." *Cannon*, 441 U.S. at 717, 99 S.Ct. at 1968 (emphasis in original). I conclude that an

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[7]*See Rogers*, 611 F.2d at 1103, 1108-09 (Goldberg, J., dissenting & Appendix); *Chaplin v. Consolidated Edison Co.*, 482 F.Supp. 1165, 1172 (S.D.N.Y. 1980).

[8]*See Rogers*, 611 F.2d at 1104-05 (Goldberg, J., dissenting).

implied private right of action exists to enforce section 503 of the Rehabilitation Act. Accordingly, I would reverse the district court's dismissal of appellant's complaint.

APPENDIX B.

Order.

In the United States District Court for the District of Arizona.

William Fisher, Plaintiff, vs. City of Tucson, Defendant. No. CIV 77-037-TUC-MAR.

Filed: November 23, 1977.

Defendant City of Tucson having moved to dismiss the above-captioned case for lack of jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, and counsel for the respective parties having fully briefed the issues and having submitted the matter on written memoranda, and counsel having presented additional memoranda on the issue of exhaustion of administrative remedies, the Court, on due consideration of the pleadings and memoranda filed, rules as follows:

I. Plaintiff asserts a private right of action pursuant to Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, for defendant's alleged discrimination against plaintiff on the basis of physical handicap, and for defendant's alleged failure to comply with the statutorily imposed affirmative action obligation. Because the complaint sets forth a substantial federal question involving the interpretation of an act of Congress, and has placed in controversy an amount in excess of $10,000, the Court has original jurisdiction of the cause pursuant to 28 U.S.C. § 1331(a). *Hagans v. Lavine*, 415 U.S. 528 (1974); *Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975).

II. The central issue framed by the instant motion is whether plaintiff has started a claim for relief under Section 503. Accordingly, the Court deems the motion to have been raised pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

III. In determining whether an independent right of action for damage and injunctive relief should be implied under Section 503, the Court is guided by the criteria enumerated in *Cort v. Ash*, 422 U.S. 66 (1975): (1) whether the plaintiff is one for whose especial benefit the statute was enacted; (2) whether there is an indication of legislative intent to create a private remedy; (3) whether the implication of a private right of action would be consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law, in an area basically the concern of the States. In applying the enumerated criteria, the Court finds that plaintiff does not have an independent cause of action under Section 503.[1] *Accord Rogers v. Frito-Lay, Inc.*, 433 F. Supp. 200 (N.D. Tex. 1977).

a. For purposes of the instant motion, the Court assumes that plaintiff is a handicapped individual within the meaning of 29 U.S.C. § 706(6) and 41 C.F.R. § 60-741.2, and that the City of Tucson is a federal contractor within the meaning of 29 U.S.C. § 793 and 41 C.F.R. § 60-741.2. One of the express purposes of the Rehabilitation Act is to promote

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[1]The Court expresses no opinion as to the availability of a private action for judicial review, pursuant to Section 10 of the Administrative Procedure Act, 5 U.S.C. § 704. The complaint in this case does not name the Director of the Office of Federal Contract Compliance Programs as a party-defendant, nor does it allege arbitrary, capricious, or unlawful action by the agency. Accordingly, the Court has limited its consideration to the issue of a separate and independent cause of action for damages and injunctive relief against the City of Tucson. In any event, plaintiff's failure to pursue the administrative review available to him pursuant to 41 C.F.R. § 60-741.26(g) militates against his right to bring an action for *a posteriori* judicial review. In bypassing the available administrative appeal, plaintiff precluded the agency from applying its expertise and correcting its own errors, if any. *See American Federation of Government Employees v. Dunn*, ____ F.2d. ____ (9th Cir. Sept. 28, 1977); *Keele v. U.S.*, 498 F.2d 449 (9th Cir.), *cert. den.* 417 U.S. 915 (1973); *Ensey v. Richardson*, 469 F.2d 664 (9th Cir. 1972).

and expand employment opportunities for handicapped individuals and to place such individuals in employment. 29 U.S.C. § 701(8). Plaintiff, as a handicapped individual, is a member of the class for whose particular protection the Rehabilitation Act was enacted. *Lloyd v. Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977); *cf. Lau v. Nichols*, 414 U.S. 563 (1974).

b. The second *Cort* criterion weighs against the implication of an independent civil action under Section 503. Section 503 on its face contemplates enforcement through administrative action rather than through private suits. The statute and regulations impose affirmative action obligations on federal contractors with regard to the employment of handicapped individuals, and provide a detailed enforcement scheme to be administered by the U.S. Department of Labor. Under the regulations, the Director of the Office of Federal Contract Compliance Programs is vested with discretion in evaluating contractor and agency performance. 41 C.F.R. §§ 60-741-.25, 60-741.26(g)(2). Also, the Act recognizes a discretion in the executive branch to waive the requirements of Section 503 if the national interest so requires. 29 U.S.C. § 793. Thus, the statute itself indicates that Congress contemplated implementation through an administrative body vested with both authority and flexibility. Likewise, the relevant legislative history indicates that Congress was concerned with setting up an effective administrative enforcement program rather than authorizing a private civil remedy. As stated in Senate Report No. 93-1297, Congress intended "that Sections 503 and 504 be administered in such a manner that a consistent, uniform and effective Federal approach to discrimination against handicapped persons would result" and that federal agencies and departments would cooperate to that end. 4 U.S. Code Cong. & Admin. News 6391 (1974). The only mention in

the Senate Report of a private judicial remedy is with respect to Section 504 rather than 503, and apparently refers to judicial review of an administrative proceeding rather than an independent cause of action in federal court. *Id.; Lloyd v. Regional Transportation Authority, supra,* 548 F.2d at 1286. Although the absence of an express Congressional intent to confer a private right of action is not conclusive, the Court finds that the absence of an express intent in this case, when considered against the framework of an elaborate administrative enforcement scheme, indicates that Congress intended the administrative remedies to be exclusive in the first instance.[2]

c. The implication of an independent right of action under Section 503 would be inconsistent with the existing enforcement scheme. Pursuant to 41 C.F.R. § 60-741.26 *et seq.* an individual may file a complaint with the Director of the Office of Federal Contract Compliance Programs if he or she feels that a violation of the Act or of applicable regulations has occurred. The agency is responsible for instituting a prompt investigation and for developing a complete case record. If the investigation reveals that no violation has occurred, the complainant may request review by the Director within 30 days. The Director is authorized to secure compliance by federal contractors through conciliation and persuasion, contractual measures (such as withholding progress payments), and suits for judicial enforce-

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[2]In *Lloyd v. Regional Transportation Authority, supra,* upon which plaintiff most strongly relies, the Seventh Circuit indicated that once a meaningful administrative enforcement mechanism is provided under Section 504, the private cause of action should be limited to *a posteriori* judicial review. 548 F.2d at 1286 n. 29. Similarly, in *Drennon v. Philadelphia General Hospital,* 428 F. Supp. 809 (E.D. Pa. 1977), the court, under the doctrine of primary jurisdiction, required the plaintiff to first exhaust her administrative remedies under Section 503 of the Act before proceeding in the judicial action under Sections 503 and 504, 42 U.S.C. § 1983, and the Fourteenth Amendment. At 816-818.

ment. 41 C.F.R. § 60-741.28. In the event of an apparent violation, the contractor must be afforded an opportunity for a formal hearing before sanctions are imposed. 41 C.F.R. § 60-741.29. If an independent cause of action were available, complainants might be tempted to bypass the existing administrative remedies in an effort to secure individually fashioned relief in court, and thereby undermine the express goal of uniform federal enforcement. Additionally, the implication of a private cause of action cuts against the express policy favoring informal resolution through conciliation and persuasion. Finally, there are numerous factual determinations relevant to an alleged violation of Section 503 which are better left to administrative expertise in the first instance.[3] Under the circumstances, the Court finds that an implied civil remedy would diminish rather than enhance the effectiveness of the available enforcement procedures. *Cf. Stewart v. Travelers Corporation*, 503 F.2d 108 (9th Cir. 1974).

d. Concededly, the prohibition of employment discrimination against the handicapped by federal contractors is a

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[3]The factual and/or legal issues pertinent to an alleged violation of Section 503 include the following: whether an individual is a qualifying "handicapped individual" within the meaning of the Act and regulations; whether the contractor is a "federal contractor" within the meaning of the Act; whether a contractor has complied with its affirmative action obligation; and whether a planned future commitment pursuant to 41 C.F.R. § 60-741.26(g)(2) is sufficient under the circumstances. The Court believes such determinations should be made in the first instance by the agency responsible for administering the statute. Only after a complainant has fully exhausted his administrative remedies should the agency's determinations be subject to judicial review, particularly where, as here, the statutory scheme is relatively new and sets forth unfamiliar standards. *See Rogers v. Frito-Lay, Inc. supra*, 433 F. Supp. at 202-203.

matter of federal concern.[4] However, the implication of a private judicial remedy, apart from the right to judicial review of administrative action, is not thereby required. In *Cort v. Ash, supra*, the Supreme Court held merely that courts should be reluctant to imply a private federal remedy in areas traditionally relegated to state law; the Court did not hold the converse to be true — *i.e.* that a private remedy *must* be implied in areas of federal concern. Where the federal policy can be effectively implemented through administrative enforcement machinery, and where an independent right of action would diminish rather than enhance the effectiveness of that machinery, *Cort v. Ash* does not require that a private right of action be implied.

IT IS THEREFORE ORDERED that defendant's motion to dismiss the complaint is granted on the ground that plaintiff has failed to state a claim for which relief can be granted.

Dated: November 23, 1977

/s/ Mary Anne Ruhey
UNITED STATES DISTRICT JUDGE

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[4]The prohibition of employment discrimination against the handicapped is also a matter of local concern. The Tucson City Code prohibits discrimination against the physically handicapped by employers in general and by the City of Tucson in specific. Ord. No. 4616, Tucson City Code, Ch. 17, §§ 17-12 and 17-20. Thus, the advancement of employment opportunities for handicapped individuals is not the exclusive domain of either federal or state and/or local legislation.

APPENDIX C.

Order.

For the Ninth Circuit.

William Fisher, Plaintiff-Appellant, v. City of Tucson, an unincorporated municipality, Defendant-Appellee. No. 78-1251. DC No. CIV77-037TUC(MAR).

Filed: March 31, 1982.

Appeal from the United States District Court for the District of Arizona.

Before: HUG, FLETCHER and FARRIS, Circuit Judges.

The panel, as constituted in the above case, voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court was advised of the suggestion for an en banc hearing, and a judge in active service requested that a vote be taken. Fed. R. App. P. 35(b). The suggestion for an en banc hearing failed to obtain the required majority.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D.

(1) 29 U.S.C. § 701. Congressional declaration of purpose

The purpose of this chapter is to develop and implement, through research, training, services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living.

(1) develop and implement comprehensive and continuing State plans for meeting the current and future needs for providing vocational rehabilitation services to handicapped individuals and to provide such services for the benefit of such individuals, serving first those with the most severe handicaps, so that they may prepare for and engage in gainful employment;

(8) promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment;

(2) 29 U.S.C. § 793. Employment under Federal contracts

Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President

shall implement the provisions of this section by promulgating regulations within ninety days after September 26, 1973.

Administrative enforcement; complaints; investigations; departmental action

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

Waiver by President; national interest special circumstances for waiver of particular agreements

(c) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which he shall prescribe, when he determines that special circumstances in the national interest so require and states in writing his reasons for such determination.

(3) 29 U.S.C. § 794a. Remedies and attorney fees

(a) (1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964, including the application of sections 706(f) through 706(k), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such

section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

FILED
APR 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1338

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM FISHER,

Petitioner,

vs.

CITY OF TUCSON, an
incorporated municipality,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

Page

Question Presented..... 2

Statement of the Case..... 2

Reasons Why the Writ Should Be Denied..... 3

I. The Finding that a Congressional Enactment Creates a Federal Right on Behalf of the Petitioner does not Mean that Congress did not Property Prescribe the Nature of the Right and the Manner by Which it is to be Exercised..... 3

II. The Court below is the Sixth Circuit Court to have Ruled Upon Whether Section 503 Creates a Private Right to Sue and with its Decision the Court below Became the Sixth Circuit Court to have Found that No Private Right of Action is Provided by Section 503..... 6

III. This Court upon Three Previous Occasions has Reviewed and Denied Petitions for Certiorari in which the Question of Whether Section 503 Provides a Private Right to Sue was a Substantial, if not the singular, Issue..... 8

IV. Section 503 Does Not Create a Property Entitlement in Handicapped Persons..... 10

Conclusion.....12

CITATIONS

Cases: Page

Auffant v. Searle and Co., 25 FEP Cases 1254 (D.P.R. 1981).....7

Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981).....7

Coleman v. Noland Company, Inc., 21 FEP Cases 1248 (W.D. Va. 1980).....7

Cort v. Ash, 422 U.S. 66 (1975).....4

Davis v. Modine Mfg., Co., 526 F.Supp. 943 (D. Kan. 1981).....8

Davis v. United Air Lines, Inc., 662 F.2d 120, (2d Cir. 1981), cert. denied, 50 U.S. L.W. 3881 (May 4, 1982).....7,9,10

Fisher v. City of Tucson, 663 F.2d 861 (1981).....,5,6

Hooper v. Equilox, Inc., 611 F.2d 134 (5th Cir. 1979).....7

Moon v. Atchison, Topeka & Santa Fe Ry., Co., 22 FEP Cases 1252 (D. Kan. 1980).....8

CITATIONS

Cont. Page

Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1979), cert. denied, 449 U.S. 889 (1980).....7,9

Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1980), cert. denied, 102 S. Ct. 1485 (1982).....7,9

Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980).....7

Statutes:

Rehabilitation Act of 1973, Sec. 503 (29 U.S.C. §793).....3

United States Code, Title 29, Sec. 793 (b).....5

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent City of Tucson respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 663 F.2d 861 (1981).

QUESTION PRESENTED

DOES SECTION 503 OF THE REHABILITATION ACT OF 1973 (29 U.S.C. §793 as amended), WHICH REQUIRES GOVERNMENT CONTRACTS TO CONTAIN AFFIRMATIVE ACTION COVENANTS REGARDING THE EMPLOYMENT OF HANDICAPPED INDIVIDUALS, IMPLIEDLY PROVIDE AN INDIVIDUAL WITH A PRIVATE RIGHT OF ACTION?

STATEMENT OF THE CASE

While the petitioner's Statement of the Case is not inaccurate, the respondent believes it is important to particularly note that there has never been any findings of fact determined in this matter. In the District Court the case was dismissed upon preliminary motion with the determination that the petitioner failed to state a claim upon which relief could be granted. Therefore, the Court of Appeals had no findings of fact before it; thus the Court, appropriately for purposes of the appeal, merely assumed the truth of the allegations set forth in the petitioner's amended complaint.

Under such circumstances the facts, whatever they might be, are unproven and, the respondent would submit, of little significance herein.

REASONS FOR DENYING THE WRIT

I.

THE FINDING THAT A CONGRESSIONAL ENACTMENT CREATES A FEDERAL RIGHT ON BEHALF OF THE PETITIONER DOES NOT MEAN THAT CONGRESS DID NOT PROPERLY PRESCRIBE THE NATURE OF THE RIGHT AND THE MANNER BY WHICH IT IS TO BE EXERCISED.

The petitioner submits in his first argument that where there is a determination that federal law provides a federal right, a private cause of action is also created in an essentially automatic fasion without regard to congressional intent. Petition, 5-7. Therefore, the petitioner reasons that the finding by the court below that Section 503 of the Rehabilitation Act of 1973 creates a

federal right on behalf of handicapped persons requires the conclusion that Section 503 also creates a private cause of action. While perhaps attractive upon first impression and certainly simple and easily applied, this reasoning is too facile.

The Court has not so readily discounted other relevant factors in determining whether a private right of action may be implied to enforce a statute in which there is no explicit provision for such a remedy. Cort v. Ash, 422 U.S. 66 (1975). In its effort to determine whether Congress intended to create in handicapped persons a private cause of action, the court below carefully analyzed the statute and its history in relation to the controlling factors established in Cort v. Ash. Its reasoning that "the statute was intended to benefit handicapped persons" and thus "creates a federal

right" on their behalf [Fisher v. City of Tucson, 663 F.2d 861, 863 (1981)], is not inconsistent with the full statutory scheme established by Section 503, nor does it offend established case law.

As the court below determined:

> It seems apparent that Congress did intent to confer some federal rights on handicapped individuals. However, the fact that these rights were conferred on handicapped individuals does not necessarily lead us to conclude that Congress intended to create a private right of action to enforce them. To the contrary, Congress could well have intended to limit the exercise of these rights to the context of the administrative enforcement scheme. Fisher, 663 F.2d at 864.

The statute provides a complaint, investigatory and enforcement scheme through the Department of Labor [29 U.S.C. §793 (b)], a process which was completely utilized by the petitioner and which fully reflects the nature and extent of

the remedies intended by Congress. Unquestionably, as the court below properly held, Congress can create a federal right and prescribe the manner by which it shall be exercised. The lower court's analysis of the legislative intent underlying Section 503 and the inconsistency of a private remedy with the fundamental purpose of the legislation makes the ruling of the court below proper and compelling.

II.

THE COURT BELOW IS THE SIXTH CIRCUIT COURT TO HAVE RULED UPON WHETHER SECTION 503 CREATES A PRIVATE RIGHT TO SUE AND WITH ITS DECISION THE COURT BELOW BECAME THE SIXTH CIRCUIT COURT TO HAVE FOUND THAT NO PRIVATE RIGHT OF ACTION IS PROVIDED BY SECTION 503.

With its decision in Fisher v. City of Tucson, supra, the Ninth Circuit Court joined the Second, the Fifth, the Sixth,

the Seventh and the Eighth Circuit Courts[1] in concluding that Section 503 does not provide a private cause of action. Every circuit court which has considered the issue has reached the very same conclusion. No circuit court has found a private right of action to exist under Section 503.

Furthermore, in the First and Fourth Circuits, where there has not been a circuit court decision, district courts have held that there is no private right of action.[2]

---

1 Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1979); Hooper v. Equilox, Inc., 611 F.2d 134 (6th Cir. 1979); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) and Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981).

2 Auffant v. Searle and Co., 25 FEP Cases 1254 (D.P.R. 1981) and Coleman v. Noland Company, Inc., 21 FEP Cases 1248 (W.D. Va. 1980).

In the Tenth Circuit, the district courts are divided with no private right having been held in Moon v. Atchison, Topeka & Santa Fe Ry., Co., 22 FEP Cases 1252 (D. Kan. 1980), while in Davis v. Modine Mfg., Co., 526 F. Supp. 943 (D. Kan. 1981) a private right was found to exist.

The consistent uniformity of the circuit courts' analyses and interpretation of Section 503, along with the exitence of little dispute at the district court level argues well against the need for the Court to accept this petition.

III.

THIS COURT UPON THREE PREVIOUS OCCASIONS HAS REVIEWED AND DENIED PETITIONS FOR CERTIORARI IN WHICH THE QUESTION OF WHETHER SECTION 503 PROVIDES A PRIVATE RIGHT TO SUE WAS A SUBSTANTIAL, IF NOT THE SINGULAR, ISSUE.

The Court has in the recent past reviewed and denied petitions for

certiorari in three cases in which a focused issue was whether Section 503 provides a private right to sue to handicapped persons. The Court was first presented the issue in Rogers v. Frito-Lay, Inc., cert. denied 449 U.S. 889 (1980), where the Fifth Circuit Court in an exhaustive analysis concluded that no private right of action existed. Next the Court saw the issue in the Eighth Circuit's decision in Simon v. St. Louis County, cert. denied 102 S.Ct. 1485 (1982). In Simon the court adopted the analysis in Rogers v. Frito-Lay, Inc., on the Section 503 issue. Finally, the issue was again just presented in Second Circuit's decision in Davis v. United Air Lines, Inc., cert. denied, 50 U.S. L.W. 3881 (May 4, 1982), and once again the circuit court provided an extensive and well-reasoned analysis of the issue.

This petition now before the Court provides no new substantive basis upon which to accept review and comes to the Court just three months after the Court's last consideration of a petition on the issue in Davis. Simply, there is no need for the Court's acceptance of this petition or a statement on the issue.

IV.

SECTION 503 DOES NOT CREATE A PROPERTY ENTITLEMENT IN HANDICAPPED PERSONS.

As his final argument the petitioner urges that Section 503 creates a property entitlement in handicapped persons which can be pursued by a private right of action. Here the petitioner presents the statutory scheme and the law as he wishes it might be rather than as it is. Congress did not explicitly provide for a private right of action; instead as the

court below found Congress established through Section 503 a narrow right to have all federal contracts contain covenants regarding descrimination against handcapped persons and an exclusive administrative enforcement process through the Department of Labor. The statutory scheme is complete. It simply is not as the petitioner would wish it to be, and thus he argues for the Court to legislate what Congress did not provide. Of course, the Court does not legislate, and it has been provided with no substantive basis upon which to find that the decision of the court below is not proper.

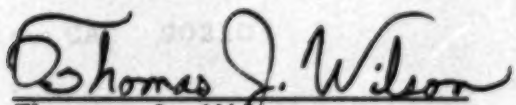
CONCLUSION

For the reasons set forth above, the respondent City of Tucson respectfully requests that the Court deny the petition for certiorari.

Dated: August 20, 1982

Respectfully Submitted,

CITY ATTORNEY'S OFFICE
City of Tucson

By 
Thomas J. Wilson
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Attorney for Respondent

CERTIFICATE OF SERVICE

I, THOMAS J. WILSON, one of the attorneys for the City of Tucson, Respondent herein, and member to the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of August, 1982, I served copies of the foregoing Respondent's Brief in Opposition on:

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CITY ATTORNEY'S OFFICE
City of Tucson

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Attorney for Respondent

81 -2322

No. ..-....

IN THE

Supreme Court of the United States

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October Term, 1981

WILLIAM FISHER,

Petitioner,

vs.

CITY OF TUCSON, an incorporated municipality,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF AMICI CURIAE, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, TWENTY-FIVE CALIFORNIA INDEPENDENT LIVING PROGRAMS: HUMBOLDT ACCESS PROJECT; COMMUNITY RESOURCES FOR INDEPENDENCE; NORTHERN CALIFORNIA INDEPENDENT LIVING PROGRAM;

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TABLE OF CONTENTS

Page

Interest of Amici 1

Summary of Argument 5

Argument 7

A. The Question of the Availability of a Private Right of Action Under § 503 Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court, Because the Decision Below Denies the Nation's Disabled a Remedy for Handicap Discrimination and Refusal to Make Reasonable Accommodation to Disability Limitations Thereby Denying Equal Access to Half This Country's Private Sector Jobs 7

B. The Holding of the Ninth Circuit in Fisher Was Premised on an Interpretation of the Phrase "Affirmative Action" Which Conflicts With How That Phrase Was Interpreted by This Court in Southeastern Community College v. Davis and by Congress 8

C. Since Fisher Was Decided at the District Court Level and Appealed Before Monell, and at the Ninth Circuit Argued and Submitted More Than a Month Before Maine v. Thiboutot, the Question of Whether Private Suit Was Authorized Under 42 U.S.C. § 1983 Was Not Addressed Below. However, as in Last Term's Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers, This May Be an Appropriate Case for Reaching the Question as a Subsidiary Question Fairly Included Within Petitioner Fisher's Statement of Questions Presented Should This Court Affirm the Judgment Below Under § 503 Alone 10

Page

D. Whether 42 U.S.C. § 1983 Is an Alternative Source of Congressional Authorization of Private Suit Under § 503 of the Rehabilitation Act, 29 U.S.C. § 793, Where the Federal Contractor, as Here, Is a Municipal Governmental Entity, Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court 12

E. Should This Court Not Grant Certiorari to Consider the Question of the Private Right of Action Under § 503, Amici Respectfully Suggest That This May Be an Appropriate Case for Summary Disposition — Namely, to Vacate the Decision Below and Remand for Reconsideration in Light of Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers, Pennhurst State School and Hospital v. Halderman, and Main v. Thiboutot 13

Conclusion 14

TABLE OF AUTHORITIES

Cases — Page

Blonder-Tongue Laboratories, Inc. v. University Foundation, 402 U.S. 313, 91 S.Ct. 1434, 29 L.Ed.2d 788 (1971) 11

Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969) 11

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) 9, 13

Davis v. United Airlines, 662 F.2d 120 (2d Cir. 1981) 12, 13

Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981) 5, 7, 8, 9, 10, 11, 12, 13

Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) 6, 10, 11, 12, 13

Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981) 6, 10, 11, 12, 13

Monell v. New York City Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) 10

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) 6, 12, 13

Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 57 L.Ed.2d 202 (1978) 11

Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir.), cert. denied, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980) 12

Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) 12

Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) 6, 8, 9

Page

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977) 9

Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 22 L.Ed.2d 776 (1968) 11

Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) 14

Regulations

Code of Federal Regulations, Title 29, Sec. 60-741.6(a)-(e) (1980) 9

Statutes

Developmental Disabilities Act, 42 U.S.C. Sec. 6012 1

Rehabilitation Act, Sec. 501 (29 U.S.C. § 791) 8

Rehabilitation Act, Sec. 503 (29 U.S.C. Sec. 793) 2, 5, 6, 7, 8, 9, 10, 12, 13

Rehabilitation Act, Sec. 504 8

Rehabilitation Act, Sec. 505(a)(1) (29 U.S.C. Sec. 794a(a)(1)) 8

United States Code, Title 29, Sec. 796 3

United States Code, Title 42, Sec. 1983 .... 6, 10, 11, 12, 13

United States Code, Title 42, Sec. 6001(7) 2

No. ..-....

IN THE

Supreme Court of the United States

October Term, 1981

WILLIAM FISHER,

Petitioner,

vs.

CITY OF TUCSON, an incorporated municipality,

Respondent.

BRIEF OF AMICI CURIAE, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, AND TWENTY-FIVE CALIFORNIA INDEPENDENT LIVING PROGRAMS.

Interest of Amici.

Amici NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, AMERICAN COALITION OF CITIZENS WITH DISABILITIES, and CALIFORNIA INDEPENDENT LIVING PROGRAMS are all organizations of and for persons with disabilities.

Amicus NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS is an association of state Protection and Advocacy systems. Under the Developmental Disabilities Act, 42 U.S.C. § 6012, and as a prerequisite for obtaining funds under the Act, each state must have in place an independent system for protecting and

advocating the rights of persons with developmental disabilities. The system must have the authority to pursue legal, administrative and other appropriate remedies on behalf of developmentally disabled persons against the state and others. "Developmental disability" is defined at 42 U.S.C. § 6001(7) as a severe and chronic disability resulting in substantial functional limitations in areas of major life activities and manifest prior to age 22. The state Protection and Advocacy systems are thus mandated to advocate on behalf of the approximately six million persons in the United States who are developmentally disabled.

Amicus AMERICAN COALITION OF CITIZENS WITH DISABILITIES (ACCD) is an umbrella organization of over 100 other organizations of and for persons with disabilities. The organization was founded in 1974 to secure and enforce the civil and human rights of all people with physical or mental disabilities, and to overcome barriers to equal employment opportunities. ACCD and its constituent organizations have worked to implement and enforce § 503 of the Rehabilitation Act of 1973 as amended along with other provisions of Title V of the Rehabilitation Act. Approximately 8 million people are represented directly and indirectly by ACCD.

The twenty-five separate CALIFORNIA INDEPENDENT LIVING PROGRAMS are disabled-run and controlled nonprofit organizations which have as their goals the realization of the right of disabled persons to develop to their potential, to live with dignity and as independently as possible, and to live and contribute in the mainstream of society. Consistent with these goals independent living programs have devoted substantial time and energy to readying people for employment and assisting them in overcoming barriers to employment, including the barrier of employer exclusion on the basis of handicap and employer refusal to

make reasonable accommodation to disability limitations. The CALIFORNIA INDEPENDENT LIVING PROGRAMS (ILP's), and particularly the Berkeley Program, have served as models for the developing consciousness among disabled throughout the country. The California ILP's also served as the model for Title VII of the Rehabilitation Act as amended in 1978, 29 U.S.C. § 796, which title is designed to foster the development of similar programs throughout the country.

Beginning in the north of the State and moving south,

HUMBOLDT ACCESS PROJECT in Eureka works with persons with disabilities in Humboldt County;

COMMUNITY RESOURCES FOR INDEPENDENCE in Santa Rosa works with persons with disabilities in Sonoma County;

NORTHERN CALIFORNIA INDEPENDENT LIVING PROGRAM in Chico works with persons with disabilities in Butte County;

MARIN CENTER FOR INDEPENDENT LIVING in San Rafael works with persons with disabilities in Marin County;

CENTER FOR INDEPENDENCE OF THE DISABLED in Belmont works with persons with disabilities in San Mateo County;

CENTER FOR INDEPENDENT LIVING, INC., in Berkeley, the first independent living program in the United States, works with persons with disabilities in the Bay area;

SAN FRANCISCO INDEPENDENT LIVING PROJECT works with persons with disabilities in San Francisco.

COMMUNITY RESOURCES FOR INDEPENDENT LIVING in Hayward works with persons with disabilities in the southern part of Alameda County including Hayward, San Leandro, Fremont and Livermore;

ADULT INDEPENDENCE DEVELOPMENT CENTER in Campbell works with persons with disabilities in Santa Clara County;

RESOURCES FOR INDEPENDENT LIVING, INC., in Sacramento works with persons with disabilities in Sacramento County and contiguous areas;

COALITION CENTER OF THE DISABLED in Modesto works with persons with disabilities in Stanislaus County;

CAPH (California Association of the Physically Handicapped) SERVICE CENTER in Fresno works with persons with disabilities in Fresno County;

BAKERSFIELD CENTER FOR INDEPENDENT LIVING works with persons with disabilities in Kern County;

INDEPENDENT LIVING RESOURCE CENTER in Santa Barbara works with persons with disabilities in Santa Barbara County;

DARRELL McDANIEL INDEPENDENT LIVING CENTER, INC., in Van Nuys works with persons with disabilities in the San Fernando Valley and in the Burbank and Glendale areas;

EAST SAN GABRIEL VALLEY SERVICES FOR THE DISABLED in West Covina works with persons with disabilities in the San Gabriel Valley;

HANDICAPPED RESOURCE CENTER in Covina works with persons with disabilities in parts of East San Gabriel Valley.

WESTSIDE COMMUNITY FOR INDEPENDENT LIVING, INC., in Los Angeles works with persons with disabilities in the South Bay (Torrance, Hawthorne) area, and in the area west of the Wilshire/Fairfax district in Los Angeles County;

GOOD SHEPHERD CENTER FOR INDEPENDENT LIVING, INC., in Los Angeles works with persons with

disabilities in the 56-mile inner city portion of Los Angeles County;

COMMUNITY REHABILITATION SERVICES in Los Angeles County works with persons with disabilities in the East Los Angeles area;

DISABLED RESOURCES CENTER, INC., in Long Beach works with persons with disabilities in the Long Beach, Lakewood, Signal Hill, Hawaiian Gardens, Bellflower and Paramount areas;

SOUTHEAST CENTER FOR INDEPENDENT LIVING in Downey works with persons with disabilities in the Southeast portion of Los Angeles County which includes some twenty cities such as Downey, Compton, Bell, Bell Gardens, etc.;

DAYLE McINTOSH CENTER FOR THE DISABLED in Garden Grove works with persons with disabilities in Orange County;

ROLLING START in San Bernardino works with persons with disabilities in San Bernardino and Riverside Counties; and

COMMUNITY SERVICE CENTER FOR THE DISABLED in San Diego works with persons with disabilities in San Diego County.

Summary of Argument.

Amici in support of Petitioner Fisher urge this Court to grant his petition for writ of certiorari with respect to *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981). The question raised by *Fisher* is an important one: whether there is a private right of action to remedy a federal contractor's violation of § 503 of the Rehabilitation Act, 29 U.S.C. § 793, namely discrimination on the basis of handicap including a refusal to make reasonable accommodation to a

person's disability limitations. The question affects the rights of over 20 million people to equal employment opportunities with respect to about 50% of the private sector jobs. Further, the decision below is premised in large part on an interpretation of the phrase "affirmative action" in § 503 which conflicts with this Court's interpretation of that phrase in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), and with Congress' interpretation of that phrase as reflected in the 1978 Amendments to the Rehabilitation Act.

Although only a minority of the jobs covered by § 503 are in the public sector (since most federal contracts for goods and services are with private sector companies), an important question is also raised with respect to 42 U.S.C. § 1983 and whether § 1983 is an alternative source of Congressional authorization for private suit under § 503 where, as here, the federal contractor is a "person" within the meaning of 42 U.S.C. § 1983. Although § 1983 was not raised or considered below, it is appropriate for this court to consider § 1983 under the criteria enunciated last term in *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1, 19, 101 S.Ct. 2615, 2626, 69 L.Ed.2d 435, 450 (1981). Alternatively, should this Court elect not to consider the 5503 private right of action question, *Amici* suggest that the case may be appropriate for summary disposition by vacating the judgment below and remanding the matter for consideraton in light of *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers, supra*, of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), and of *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980) with respect to the § 1983 question.

ARGUMENT.

A. The Question of the Availability of a Private Right of Action Under § 503 Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court, Because the Decision Below Denies the Nation's Disabled a Remedy for Handicap Discrimination and Refusal to Make Reasonable Accommodation to Disability Limitations Thereby Denying Equal Access to Half This Country's Private Sector Jobs.

Amici organizations collectively represent directly and indirectly over ten million persons in the United States with disabilities. A key concern of the organizations and their constituents is overcoming barriers to equal access to the mainstream of society including overcoming barriers to employment.

A significant segment of the six million persons with developmental disabilities has the potential for competitive employment. However, only 14 percent of the working age severely disabled population (which includes the developmentally disabled) and only 42 percent of the nonseverely disabled population are working compared with 74 percent of the non-disabled. Part of the discrepancy is attributable to the denial of equal employment opportunity, including the denial of the reasonable accommodation needed to accommodate to disability limitations. However, the Ninth Circuit's decision in *Fisher* denies Americans with disabilities the right to enforce Congress' promise of equal employment opportunity, as embodied in § 503 of the Rehabilitation Act, 29 U.S.C. § 793, and denies them access to employment with federal contractors, a group of the Department of Labor, OFCCP, estimates as providing 50% of this country's private sector jobs.

B. The Holding of the Ninth Circuit in *Fisher* Was Premised on an Interpretation of the Phrase "Affirmative Action" Which Conflicts With How That Phrase Was Interpreted by This Court in *Southeastern Community College v. Davis* and by Congress.

This Court in *Southeastern Community College v. Davis*, 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979) contrasted the obligations imposed by §§ 501 and 503 on the one hand and § 504 on the other:

> "The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the even handed treatment of qualified handicapped persons [§ 504] and affirmative efforts to overcome the disabilities caused by handicaps [§§ 501 and 503]." *Id.*, 442 U.S. at 412, 99 S.Ct. at 2369.

This Court interpreted "affirmative action" as used in §§ 501 and 503 to mean "accommodation to the needs of a disabled person" or an obligation to make reasonable accommodation to the disabililty limitations of a disabled person. *Id.*, 442 U.S. at 415, 99 S.Ct. at 2370. This interpretation is consistent with Congress' interpretation of that term as reflected in the limitations imposed on the federal government's affirmative action obligation under § 501 of the Rehabilitation Act, 29 U.S.C. § 791, by the 1978 amendments:

> ". . . In fashioning an equitable or affirmative action remedy under such section [§ 501], a court may take into account the reasonableness of the cost of any necessary work place accommodation, or the availability of alternatives therefor or other appropriate relief. . . ." § 505(a)(1) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(1).

Similarly, the Department of Labor has consistently interpreted "affirmative action" as used in § 503 as imposing both nondiscrimination and reasonable accommodation obligations on covered employees with respect to individual applicants and employees. 29 C.F.R. § 60-741.6(a)-(e) 1980)

The *Fisher* majority, however, failed to define the phrase "affirmative action" in terms of reasonable accommodation or special efforts to overcome disability limitations as has this Court. As a result of the *Fisher* majority's failure to look to *Southeastern Community College v. Davis* for guidance in interpreting the obligations imposed under § 503, the *Fisher* majority based its finding with respect to the second part of the test in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), on an erroneous premise — namely that the "affirmative action" protection in § 503 is not amenable to judicial enforcement and therefore Congress could not have intended for § 503 rights to be enforced in private actions. *Fisher v. City of Tucson, supra*, 663 F.2d at 864-65. In actuality federal courts have had substantial experience in applying the concept of reasonable accommodation to the facts in individual cases with respect to claims of employment discrimination because of a failure to make or attempt a reasonable accommodation to a religious practice. *E.g., Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977).

Further, the *Fisher* majority's finding with respect to the third part of the *Cort v. Ash* test — namely, whether private enforcement is consistent with the underlying purpose of the legislative scheme — is also premised on the majority's failure to understand what "affirmative action" means with respect to claims by alleged discriminatees. *Fisher v. City of Tucson, supra*, 663 F.2d at 866-67. The criteria and

method for evaluating Fisher's complaint would be the same judicially and administratively, assuming failure to hire was because of a handicapping condition:

> Whether the exclusion is justifiable because of job-related or business necessity reasons, and, if so, whether or not the employer is able to make reasonable accommodation to the otherwise disqualifying handicapping condition without undue hardship.

Therefore, a private remedy would be consistent with administrative enforcement of a § 503 and the underlying purpose of the legislative scheme.

C. Since *Fisher* Was Decided at the District Court Level and Appealed Before *Monell*, and at the Ninth Circuit Argued and Submitted More Than a Month Before *Maine v. Thiboutot*, the Question of Whether Private Suit Was Authorized Under 42 U.S.C. § 1983 Was Not Addressed Below. However, as in Last Term's *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, This May Be an Appropriate Case for Reaching the Question as a Subsidiary Question Fairly Included Within Petitioner Fisher's Statement of Questions Presented Should This Court Affirm the Judgment Below Under § 503 Alone.

The district court decision in this case issued November 23, 1977. The notice of appeal was therefore filed in early 1978 — well before this Court's June 6, 1978, opinion in *Monell v. New York City Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), which held that municipal entities were "persons" within the meaning of 42 U.S.C. § 1983. The *Fisher* case was argued and submitted May 14, 1980 — more than a month before this Court's June 25, 1980, decision in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555

(1980), which held that 42 U.S.C. § 1983 encompasses claims based on purely statutory violations of federal law. The criteria making it appropriate in *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), to reach the question of the applicability of *Maine v. Thiboutot* is thus present in *Fisher*:

> "It is appropriate to reach the question of the applicability of *Maine v. Thiboutot* to this setting. Despite the failure of the respondents to raise it here or below. This case began long before that decision. Moreover, if controlling, this argument would obviate the need to consider whether Congress intended to authorize private suits to enforce these particularly federal statutes. The claim brought here arguably falls within the scope of *Maine v. Thiboutot* because it involves a suit by a private party claiming that a federal statute has been violated under color of state law, causing an injury." *Id.*, 453 U.S. at 19, 101 S.Ct. at 2626, 69 L.Ed.2d at 450.

This Court on other occasions has considered issues not addressed below, given exceptional circumstances. For instance, in *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969), which came to the Court on a writ of habeus corpus on the voluntariness of a confession (with judgment below affirmed on this issue), the Court, pursuant to its opinion the prior term in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 22 L.Ed.2d 776 (1968), reached the issue of the exclusion of Jury members because of the capital punishment opinions. *Cf.*, *Procunier v. Navarette*, 434 U.S. 555, 560-61 n. 6, 98 S.Ct. 855, 858-59, 57 L.Ed.2d 202 (1978), "In any event, our power to decide is not limited by the precise terms of the question presented." *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 320 n. 6, 91 S.Ct. 1434, 1438, 29 L.Ed.2d 788 (1971).

D. Whether 42 U.S.C. § 1983 Is an Alternative Source of Congressional Authorization of Private Suit Under § 503 of the Rehabilitation Act, 29 U.S.C. § 793, Where the Federal Contractor, as Here, Is a Municipal Governmental Entity, Is an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

This Court in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), "held that 42 U.S.C. § 1983 provides a cause of action for state deprivations of any 'rights secured' by 'the laws' [of the United States]." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28, 101 S.Ct. 1531, 1545, 69 L.Ed.2d 694 (1981). In *Pennhurst* and in *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1, 19, 101 S.Ct. 2615, 69 L.Ed.2d 450 (1981), this Court articulated a two-pronged test to determine whether 42 U.S.C. § 1983 may be an alternative source of Congressional authorization of private suit:

1. Whether the statute created or secured a substantive right.
2. Whether "Congress intended to foreclose implied private actions [and] also . . . intended to supplant any remedy that otherwise would be available under § 1983." *Middlesex Cty. Sewerage Authority v. Nat'l Sea Clammers, supra*, 453 U.S. at 21, 101 S.Ct. at 2627.

The court below found § 503 "creates a federal right on behalf of the protected class" of handicapped persons. *Fisher v. City of Tucson, supra*, 663 F.2d at 863. Therefore the first prong of the test is met.[1]

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[1]This holding is admittedly contrary to holdings in other circuits which found that § 503 does not confer a right in favor of handicapped individuals. *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1079-80 (5th Cir.), *cert. denied*, 449 U.S. 889, 101 S.Ct. 246, 66 L.Ed.2d 115 (1980); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1239-40 (7th Cir. 1980); *Davis v. United Airlines*, 662 F.2d 120, 122-123 (2d Cir. 1981). *See also Fisher v. City of Tucson, supra*, 663 F.2d at 863 and (dissent) 868 and n. 1.

The second prong of the test differs from the second part of the test in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975), as articulated by the *Fisher* majority below. The Ninth Circuit found that "Congress did not intend to create a private right of action to enforce section 503." *Fisher v. City of Tucson, supra*, 663 F.2d at 865. The test for foreclosing a remedy under 42 U.S.C. § 1983, however, requires more than a finding that Congress did not intend to create a private right of action: A remedy under § 1983 is available to a handicapped individual *unless* there is a showing that Congress intended to *foreclose* an implied private action, and, further and additionally, intended to *supplant* any remedy under § 1983. Such a conclusion cannot be drawn from the majority opinion below and, *Amici* submit, could not be drawn from the language of the statute or the legislative history surrounding § 503 and the Rehabilitation Act and subsequent amendments.[2]

E. Should This Court Not Grant Certiorari to Consider the Question of the Private Right of Action Under § 503, *Amici* Respectfully Suggest That This May Be an Appropriate Case for Summary Disposition — Namely, to Vacate the Decision Below and Remand for Reconsideration in Light of *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers*, *Pennhurst State School and Hospital v. Halderman*, and *Maine v. Thiboutot*.

The grounds for urging consideration of the question of whether § 1983 is an alternative source of Congressional authorization of private suit under § 503 of the Rehabili-

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[2]Judge Oakes of the Second Circuit writing for a divided court in *Davis v. United Airlines*, 662 F.2d 120, 127 (2d Cir. 1981): "But we conclude, as have the other three courts of appeals that have passed upon the question, that no implied private right of action exists under section 503, *recognizing that the glass through which we see is by no means crystal clear but is so cloudy as to be barely translucent.*" (emphasis added.)

tation Act, 29 U.S.C. § 793, should this Court find there is no private right of action under § 503, are also the grounds making summary disposition of this case appropriate. *See Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976), in which this Court in a *per curiam* decision remanded the case for consideration of the Supremacy Clause question of whether the state statute conflicted with the Social Security Act even though the issue had not been raised or addressed below.

Conclusion.

For the reasons set forth above, *Amici* submit that this is an appropriate case for granting the petition for writ of certiorari.

Dated: June 18, 1982.

Respectfully submitted,

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